LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
OCT 21 1961
JAMES R. BROWNING, CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1961**

---

## No. 157

---

MARK COPPEDGE, JR.,

*Petitioner,*

*vs.*

UNITED STATES.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## BRIEF FOR PETITIONER

---

BENNETT BOSKEY
*1701 K Street, N. W.*
*Washington 6, D. C.*

*Attorney for Petitioner*
*(by appointment of the*
*Court of Appeals)*

October, 1961

# INDEX

SUBJECT INDEX


Page

BRIEF FOR PETITIONER:

Opinions Below ..... 1

Jurisdiction ..... 1

Constitutional, Statutory and Rules Provisions Involved ..... 2

Questions Presented ..... 2

Statement ..... 5

1. Petitioner's first trial ..... 5
2. The challenge to the indictment ..... 7
3. Grounds for disqualification of Judge Holtzoff ..... 11
4. The trial ..... 13
   (1) Issues as to use of the co-defendant Artis' first-trial testimony ..... 14
   (2) Issues as to the prejudicial unfairness of the prosecutor's summation ..... 19
   (3) Issues as to Judge Holtzoff's charge ..... 22
5. Attempts to obtain an appellate determination on the merits ..... 24

Summary of Argument ..... 28

Argument ..... 31

I. The Court of Appeals' Refusal to Allow an Appeal in Forma Pauperis and to Hear and Determine the Appeal on the Merits Constituted a Plain Departure From Established Law ..... 31

Page

II. Numerous Prejudicial Errors Were Committed in Denying Petitioner's Motion to Dismiss the Indictment ..... 37

A. The indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured ..... 37

B. An indictment based on substantial false and perjured testimony is not automatically salvaged by the fact that "other competent evidence" may have also been before the grand jury ..... 39

C. The grand jury transcript was erroneously withheld from defense counsel ..... 41

D. In any event, appellate review is required to determine whether the District Court erred in determining there was sufficient other competent evidence before the grand jury ..... 42

E. In any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether Government agents were responsible for inducing false and perjured testimony by Thompkins for presentation to the grand jury ..... 43

III. Judge Holtzoff Should Have Disqualified Himself and Permitted the Case to Be Tried Before Another Judge ..... 46

Page

IV. Serious Prejudicial Errors Were Committed by Judge Holtzoff in Connection With the Prosecution's Being Allowed to Use Extensive Testimony Given at the First Trial by the Co-defendant Artis, Who Was Unavailable as a Witness at This Second Trial ..... 51

A. Judge Holtzoff's erroneous exclusion of Artis' subsequent recantation, as well as of Artis' other contradictory admissions ..... 51

B. Judge Holtzoff's prejudicial error in failing and refusing to inform the jury of the deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial ..... 55

C. Judge Holtzoff's error in failing to require the prosecution to produce the original of the Artis statement of December 2, 1958 ..... 56

D. Judge Holtzoff's error in admitting damaging hearsay on the Artis matter ..... 57

E. Judge Holtzoff's error in refusing to exclude entirely the Artis first-trial testimony under the unusual circumstances of this case ..... 57

V. The Prosecutor in His Summation, by Inexcusably Vouching for the Veracity of Government Witnesses, Deprived Petitioner of a Fair Trial ..... 60

VI. Corroboration Should Be Required to Support a Conviction Based on the Testimony of an Accomplice ..... 63

VII. Judge Holtzoff's Charge Was Totally Defective in Omitting to Define an Essential Element of the Offenses ..... 68

Page

VIII. Strong Considerations Favor This Court's Deciding the Merits of Petitioner's Appeal Now, Instead of Remanding for an Initial Determination by the Court of Appeals ..... 69

CONCLUSION ..... 70

APPENDIX A:

Constitutional, Statutory and Rules Provisions Involved ..... 73

APPENDIX B:

Counts 3 Through 10 of the Indictment ..... 78

CITATIONS

CASES:

*Alcorta* v. *Texas*, 355 U.S. 28 ..... 44
*Barry* v. *United States*, 109 App. D.C. 301, 287 F.2d 340 ..... 23, 27, 68, 69
*Benedicto Lebron* v. *United States*, 241 F.2d 885 (1st Cir. 1957) ..... 63
*Berger* v. *United States*, 255 U.S. 22 ..... 50
*Berger* v. *United States*, 295 U.S. 78 ..... 60
*Bishop* v. *United States*, 100 App. D.C. 88, 243 F.2d 32 (1957) ..... 63
*Brown* v. *United States*, 293 F.2d 149 (D.C. Cir. 1961) ..... 33
*Burns* v. *Ohio*, 360 U.S. 252 ..... 34
*Caminetti* v. *United States*, 242 U.S. 470 ..... 65, 66, 70
*Campbell* v. *United States*, 365 U.S. 85 ..... 56
*Carver* v. *United States*, 164 U.S. 694 ..... 53
*Cash* v. *United States*, 357 U.S. 219 ..... 32
*Christoffel* v. *United States*, 338 U.S. 84 ..... 68
*Christoffel* v. *United States*, 91 App. D.C. 241, 200 F.2d 734 (1952), vacated for resentencing, 345 U.S. 947 ..... 57

Page

*Clancy* v. *United States*, 365 U.S. 312 ..... 56
*Cooke* v. *United States*, 267 U.S. 517 ..... 47
*Coppedge* v. *United States*, 106 App. D.C. 275, 272 F.2d 504 (1959) ..... 6-7, 47
*Costello* v. *United States*, 350 U.S. 359 ..... 10, 11, 28, 37, 38, 46, 70
*Crowe* v. *Di Mianno*, 225 F.2d 652 (1st Cir. 1955) ..... 47
*DeBinder* v. *United States*, 292 F.2d 737 (D.C. Cir. 1961) ..... 41
*Douglas* v. *Green*, 363 U.S. 192 ..... 34
*Edwards* v. *United States*, 355 U.S. 36 ..... 32
*Egan* v. *United States*, 52 App. D.C. 384, 287 Fed. 958 (1923) ..... 63
*Ellis* v. *United States*, 356 U.S. 674 ..... 2, 28, 31, 32, 36
*Eskridge* v. *Washington State Board*, 357 U.S. 214 ..... 34
*Esters* v. *United States*, 260 F.2d 393 (8th Cir. 1958) ..... 63
*Fiswick* v. *United States*, 329 U.S. 211 ..... 59
*Forrester* v. *State*, 224 Md. 337, 167 A.2d 878 (1961) ..... 64
*Freed* v. *United States*, 49 App. D.C. 392, 266 Fed. 1012 (1920) ..... 65
*Getchell* v. *United States*, 282 F.2d 681 (5th Cir. 1960) ..... 62
*Goodwin* v. *State*, 165 Tex. Cr. 375, 307 S.W.2d 264 (1957) ..... 64
*Gormley* v. *United States*, 167 F.2d 454 (4th Cir. 1948) ..... 63
*Greenberg* v. *United States*, 280 F.2d 472 (1st Cir. 1960) ..... 60, 62
*Greene* v. *McElroy*, 360 U.S. 474 ..... 57
*Griffin* v. *Illinois*, 351 U.S. 12 ..... 34
*Griffin* v. *United States*, 336 U.S. 704; 83 App. D.C. 351, 183 F.2d 990 (1949) ..... 40
*Grunewald* v. *United States*, 353 U.S. 391 ..... 52, 53
*Hale* v. *Henkel*, 201 U.S. 43 ..... 45
*Hansford* v. *United States*, 357 U.S. 578 ..... 32

Page

*Harschbert* v. *State*, 117 Tex. Cr. 504, 35 S.W.2d 430 (1930) ..... 53
*Hawkins* v. *United States*, 358 U.S. 74 ..... 65
*Hirabayashi* v. *United States*, 320 U.S. 81 ..... 58
*Hill* v. *United States*, 356 U.S. 704 ..... 32
*Hoffman* v. *United States*, 341 U.S. 479 ..... 45
*Holiday* v. *Johnston*, 313 U.S. 342 ..... 36
*Holmgren* v. *United States*, 217 U.S. 509 ....64-65, 66, 70
*Ing* v. *United States*, 278 F.2d 362 (9th Cir. 1960) ..... 64
*Johns* v. *United States*, 227 F.2d 374 (10th Cir. 1955) ..... 63
*Kelly* v. *United States*, 90 App. D.C. 125, 194 F.2d 150 (1952) ..... 67
*Knapp* v. *Kinsey*, 232 F.2d 458 (6th Cir. 1956), certiorari denied, 352 U.S. 892 ..... 47
*Krulewitch* v. *United States*, 336 U.S. 440 ..... 66
*Lawn* v. *United States*, 355 U.S.339 .....38, 39, 46, 58, 62, 70
*Levine* v. *United States*, 362 U.S. 610 ..... 50
*Lurk* v. *United States*, 366 U.S. 712 .....27, 28, 32, 35, 36
*Lyles* v. *United States*, 249 F.2d 744 (5th Cir. 1957) ..... 63
*Marcella* v. *United States*, 285 F.2d 322 (9th Cir. 1960) ..... 63
*Mattox* v. *United States*, 156 U.S. 237 .....53, 54, 70
*McAbee* v. *United States*, 361 U.S. 537 ..... 32
*McCrary* v. *Indiana*, 364 U.S. 277 ..... 34
*McQuaid* v. *United States*, 91 App. D.C. 229, 198 F.2d 987 (1952) ..... 63
*Medley* v. *State*, 338 S.W.2d 474 (Tex. Cr. App. 1960) ..... 64
*Mesarosh* v. *United States*, 352 U.S. 1 ..... 40-41
*Meyers* v. *United States*, 84 App. D.C. 101, 171 F.2d 800 (1948) ..... 57
*Milanovich* v. *United States*, 365 U.S. 551 ..... 58
*Mooney* v. *Holohan*, 294 U.S. 103 ..... 44
*Moskun* v. *United States*, 143 F.2d 129 (6th Cir. 1944) ..... 47

Page

*Murchison, In Re*, 349 U.S. 133 ..... 50
*Napue* v. *Illinois*, 360 U.S. 264 ..... 44, 70
*Nardone* v. *United States*, 308 U.S. 338 ..... 45
*Offutt* v. *United States*, 348 U.S. 11 ..... 46-47, 50
*Opper* v. *United States*, 348 U.S. 84 ..... 66
*Palermo* v. *United States*, 360 U.S. 343 ..... 43
*Parr* v. *United States*, 265 F.2d 894 (5th Cir. 1959), reversed, 363 U.S. 370 ..... 41
*People* v. *Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946) ..... 53
*People* v. *Malizia*, 4 N.Y.2d 22, 148 N.E.2d 897 (1958) ..... 64
*People* v. *Wallin*, 32 Cal.2d 803, 197 P.2d 734 (1948) ..... 64
*Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 ..... 41, 42
*Poliafico* v. *United States*, 237 F.2d 97 (6th Cir. 1956) ..... 63
*Pollard* v. *United States*, 352 U.S. 354 ..... 36, 59
*Quercia* v. *United States*, 289 U.S. 466 ..... 55
*Rosenberg* v. *United States*, 360 U.S. 367 ..... 43
*Ross* v. *Schneckloth*, 357 U.S. 575 ..... 34
*Smith* v. *Bennett*, 365 U.S. 708 ..... 34
*Smith* v. *United States*, 348 U.S. 147 ..... 66
*Smith* v. *United States*, 358 U.S. 281 ..... 32
*Smith* v. *United States*, 361 U.S. 38 ..... 32
*State* v. *Grig*, 105 N.W.2d 892 (Minn. 1960) ..... 64
*State* v. *McLaughlin*, 250 Minn. 309, 84 N.W.2d 664 (1957) ..... 64
*Stirone* v. *United States*, 361 U.S. 212 ..... 40
*Surratt* v. *United States*, 106 App. D.C. 49, 269 F.2d 240 (1959) ..... 62
*Tatum* v. *United States*, 101 App. D.C. 373, 249 F.2d 129 (1957) ..... 57
*United States* v. *Carengella*, 198 F.2d 3 (7th Cir. 1952) ..... 63
*United States* v. *Hernandez*, 282 F.2d 71 (2nd Cir. 1960) ..... 43
*United States* v. *McKeever*, 271 F.2d 669 (2nd Cir. 1959) ..... 42-43

Page

*United States* v. *Migliorino*, 238 F.2d 7 (3rd Cir. 1956) ..... 63
*United States* v. *Morgan*, 346 U.S. 502 ..... 59
*United States* v. *Procter & Gamble Co.*, 356 U.S. 677 ..... 41
*United States* v. *Sahadi*, 292 F.2d 565 (2nd Cir. 1961) ..... 58
*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 ..... 41
*United States* v. *Spangelet*, 258 F.2d 338 (2nd Cir. 1958) ..... 42
*United States* v. *Stromberg*, 268 F.2d 256 (2nd Cir. 1959) ..... 63
*United States* v. *Zborowski*, 271 F.2d 661 (2nd Cir. 1959) ..... 42
*Viereck* v. *United States*, 318 U.S. 236 ..... 60
*Watson* v. *State*, 208 Md. 210, 117 A.2d 549 (1955) ..... 64
*Weiler* v. *United States*, 323 U.S. 606 ..... 66
*Whitaker* v. *McLean*, 73 App. D.C. 259, 118 F.2d 596 (1941) ..... 47, 49
*Whittaker* v. *United States*, 281 F.2d 631 (D.C. Cir. 1960) ..... 58
*Wilde* v. *Wyoming*, 362 U.S. 607 ..... 44
*Willis* v. *United States*, 362 U.S. 216 ..... 32
*Wilson* v. *United States*, 106 App. D.C. 226, 271 F.2d 492 (1959) ..... 67
*Witham* v. *State*, 191 Tenn. 115, 232 S.W.2d 3 (1950) ..... 64
*Wright* v. *State*, 219 Md. 643, 150 A.2d 733 (1959) ..... 64
*Young* v. *United States*, 105 App. D.C. 415, 267 F.2d 692 (1959) ..... 33

Page

## Other Authorities

Constitution:

Preamble ..... 73
Fifth Amendment, Due Process Clause ..... 5, 34, 44, 58, 73
Sixth Amendment ..... 57

18 U.S.C.:

§2314 ..... 2, 5-6, 23, 68
§3500 ..... 2, 4, 18, 56

28 U.S.C.:

§144 ..... 46
§1254(1) ..... 1
§1651 ..... 1
§1915 ..... 2
§2106 ..... 1, 2, 69

District of Columbia Code:

§22-1401 ..... 2, 5, 68
§24-203 ..... 59

Federal Rules of Criminal Procedure:

Rule 26 ..... 54, 65, 66
Rule 37(b) ..... 1
Rule 52(b) ..... 2, 62

3 Wigmore, Evidence §1032 ..... 53

7 Wigmore, Evidence §2056 ..... 64

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1961**

---

## No. 157

---

MARK COPPEDGE, JR.,

*Petitioner,*

*vs.*

UNITED STATES.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## BRIEF FOR PETITIONER

---

### Opinions Below

The District Court's only opinion (R. 28-30), rendered on a pre-trial motion attacking the indictment, is not reported. The Court of Appeals rendered no opinion.

### Jurisdiction

The Court of Appeals denied leave to appeal *in forma pauperis* on November 4, 1960 (R. 64). The petition for certiorari was filed November 16, 1960. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), §1651 and §2106, and Rule 37(b) of the Federal Rules of Criminal Procedure.

## Constitutional, Statutory and Rules Provisions Involved

The pertinent text of the following constitutional, statutory and rules provisions is set forth in Appendix A to this brief:

The Constitution's Preamble and its Due Process Clause.
18 U.S.C. §2314 (transportation of a forged security).
18 U.S.C. §3500 (the Jencks Act).
28 U.S.C. §1915 (proceedings *in forma pauperis*).
28 U.S.C. §2106 (appellate determination).
District of Columbia Code, §22-1401 (forgery).
Federal Rules of Criminal Procedure, Rule 52(b) (plain error).

## Questions Presented

1. Whether petitioner's direct appeal from a criminal conviction presents one or more "not plainly frivolous" issues entitling petitioner, despite his indigence, to have his appeal reviewed and determined on the merits—particularly in the light of the standards set forth by this Court in *Ellis* v. *United States*, 356 U.S. 674, and related cases. Specifically, whether one or more of the following issues raised by petitioner's appeal is "not plainly frivolous":

(1) The group of questions as to the validity of the indictment:

(A) Whether an indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured.

(B) Whether an indictment based on substantial false and perjured testimony is automatically salvaged if "other competent evidence" implicating petitioner were also before the grand jury.

(C) Whether the grand jury transcript should have been made available to defense counsel as demanded.

(D) Whether the District Court erred in concluding there was other competent evidence before the grand jury sufficient to indict petitioner; and whether it is not the duty of an appellate court to examine the grand jury transcript to determine this when the grand jury transcript has been withheld from defense counsel.

(E) Whether in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether Government agents were responsible for inducing false and perjured testimony, implicating petitioner, for presentation to the grand jury.

(2) Whether Judge Holtzoff should have disqualified himself and permitted the case to be tried before another judge.

(3) The group of questions as to prejudice resulting from the prosecution's use of extensive testimony previously given at petitioner's first trial by the co-defendant Artis, who was unavailable at this second trial:

(A) Whether Judge Holtzoff erroneously excluded impeaching evidence showing that

Artis (i) had subsequent to the first trial entirely retracted his first-trial testimony implicating petitioner in the offenses, and (ii) had also made prior admissions contradictory to his testimony.

(B) Whether Judge Holtzoff erroneously failed and refused to inform the jury of the significant deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial.

(C) Whether Judge Holtzoff's failure to require the Government to produce the original of a statement in its possession, written out by the witness FBI agent Darragh and signed by the witness Artis, was error and in violation of the Jencks Act, 18 U.S.C. §3500.

(D) Whether prejudicial hearsay was erroneously admitted during FBI agent Darragh's rebuttal testimony on the Artis matter.

(E) Whether under the unusual circumstances of this case the first-trial testimony of Artis should have been entirely excluded.

(4) Whether the prosecutor's summation prejudiced a fair trial by unfairly vouching for the veracity of Government witnesses.

(5) Whether corroboration should be required to support a conviction based on the testimony of an accomplice.

(6) Whether Judge Holtzoff's charge was plainly defective in omitting to define an essential element of the offenses.

2. Whether the Court of Appeals' refusal to allow petitioner to prosecute his appeal *in forma pauperis* and its refusal to determine petitioner's appeal on the merits constitutes an unconstitutional (under the Due Process Clause) or an unlawful or an otherwise improper denial of justice or discrimination against indigent persons—particularly when petitioner's appeal presented issues of a type which the Court of Appeals clearly would review and determine on the merits in a comparable case involving a non-indigent appellant.

3. Whether it is in the interests of justice, in view of the history and circumstances of this case, for this Court now to determine on the merits at least some—and if necessary, all—of the issues raised by petitioner's appeal, instead of remanding to the Court of Appeals for an initial determination there on the merits.

## Statement

This case presents another chapter in the long and incredibly arduous struggle to obtain fair and equal treatment for indigent defendants in criminal cases in the federal courts.

1. *Petitioner's first trial.*

Petitioner, Mark Coppedge, Jr., was indicted in the District of Columbia on June 16, 1958 on sixteen counts. The first two counts alleged housebreaking and grand larceny offenses for breaking into a pharmacy and taking some property, including a check-writer and a batch of blank money orders. The remaining counts alleged offenses of forging, attempting to utter and uttering (D.C. Code, §22-1401), and transporting in interstate commerce (18 U.S.C.

§2314), some of the money orders. Four other persons—namely, Clarence Thompkins, Adam H. Artis, Allen W. Alexander, and Clarence H. Tyler—were charged in the same indictment. Thompkins, Artis and Alexander pleaded guilty (R. 6).

Petitioner and Tyler were tried in December 1958 *before* Judge Holtzoff and a jury. Tyler was acquitted (R. 6). Petitioner was convicted on the first ten counts,[1] and acquittal was directed on the last six counts. One of the witnesses called by the Government at the first trial was the co-defendant Artis, who gave extensive testimony which was later used by the Government at the second trial when Artis became unavailable. During the first trial the Government called as a witness the co-defendant Clarence Thompkins, who repeatedly refused to testify despite several peremptory directions from Judge Holtzoff to do so. Thompkins' court-appointed attorney, and also the prosecutor, told Judge Holtzoff that Thompkins had seen an assault by Coppedge upon Thompkins' brother and that they thought the reason for Thompkins' refusal to testify was his fear of Coppedge. Accounts of this episode, including portions occurring outside the presence of the jury, were published in the Washington newspapers, one of which stated that police records showed Coppedge to be serving a prison term for assault with a deadly weapon on Thompkins' brother.

On appeal the Court of Appeals reversed petitioner's conviction because of the prejudicial newspaper articles published during the trial and because of Judge Holtzoff's failure to take proper measures to determine the effects of such prejudice on the jury. *Coppedge* v. *United States*,

---

[1] Counts 3 through 10 of the indictment are set forth in Appendix B to this brief.

106 App. D.C. 275, 272 F.2d 504 (1959). Thereafter on October 14, 1959, new counsel was appointed by the District Court to defend petitioner at a second trial.

2. *The challenge to the indictment.*

Before the second trial took place a motion was made on November 16, 1959, challenging the validity of the indictment.[2]

This motion to dismiss and supporting documents (R. 8-10) attacked the indictment as having been obtained on the basis of Clarence Thompkins' false and perjured testimony given before the grand jury and induced by Government agents. (Thompkins was the co-defendant who, as already noted, page 6, *supra*, had refused to testify when called as a witness at the first trial.) Attached to the motion, as Exhibit 1, was a signed statement by Clarence Thompkins (entitled "Affidavit with Acknowledgment"), dated November 18, 1958, stating that on May 27, 1958, Thompkins had discussed this case with FBI Agent Joseph Woods; that Thompkins gave a false statement pertaining to the facts of said indictment against Coppedge [petitioner here] after being promised by Agent Woods that housebreaking charges against Clarence Thompkins would be dismissed if Thompkins would help to secure an indictment against Coppedge and one Tyler;

[2] In the present case the Court of Appeals denied leave to appeal *in forma pauperis* without even having ordered the record up from the District Court. Accordingly, the motion challenging the indictment is not itself included in the records of the Court of Appeals nor in the record certified to this Court by the Court of Appeals. However, the substance given here of the motion challenging the indictment does appear at R. 8-10, as part of the memorandum filed in the Court of Appeals by petitioner's present counsel; and the substance was obtained by inspecting the District Court record (designated Criminal Case No. 579-58).

that on or about June 3 and 4, 1958, Thompkins was brought to the U.S. District Court for a discussion with the U.S. District Attorney and was escorted to the grand jury room, where Thompkins gave false statements, implicating Coppedge in this offense, upon being promised by the U.S. Attorney that all other offenses would be dismissed against Thompkins upon entering a plea of guilty;[3] that this statement is not made under duress but of Thompkins' own free will and volition.

Exhibit 2 attached to this motion was a letter by Clarence Thompkins.[4] Thompkins' letter stated, among other things, that he was writing without threat or duress, of his own free will, to clear his conscience as he felt he and others had caused a great miscarriage of justice; that on May 27, 1958, Thompkins had been interviewed by FBI Agent Joseph Woods and truthfully admitted he and one Quincy McCall had committed the crime; that on June 4, 1958, Thompkins was brought to the U.S. District Court for a discussion with Mr. Flannery of the District Attorney's office and Mr. Wood, being promised by Mr. Wood and Mr. Flannery that housebreaking charges against Thompkins would be dismissed if Thompkins would help to secure indictment against other defendants; that Thompkins was escorted to the grand jury room where he gave

[3] Thompkins pleaded guilty on July 22, 1958 (R. 9).

[4] The copy of the letter attached to this motion had been addressed and sent to Mr. Dietz, the attorney who represented petitioner at the first trial. The original of the letter apparently had been addressed and sent to Judge Holtzoff while petitioner was awaiting sentence after being convicted at the first trial. At petitioner's sentencing on January 23, 1959, after conviction at the first trial, the transcript (January 23, 1959, pages 1-2) shows that Mr. Dietz then informed Judge Holtzoff that Mr. Dietz had received this letter; and that Judge Holtzoff said Judge Holtzoff had received the original of the letter from Thompkins (R. 9).

false statements implicating others; that after the indictment was returned on June 16, 1958, Thompkins had told his court-appointed counsel that he had made false statements to the grand jury, and his counsel had advised that Thompkins did not have to testify any more in the case; that a great miscarriage of justice had been done and the wrong person had been found guilty [the context shows this clearly refers to the fact that Coppedge, the petitioner here, had been found guilty at his first trial].

Also attached to the motion, as Exhibits 3 and 4, were two unsigned statements, which apparently had been written out for proposed signature by Clarence Thompkins, containing the substance of the foregoing, together with a statement that Thompkins "made certain false and misleading statements concerning Mark Coppedge, Jr., . . . such statements being prompted by Mr. Woods."

The Government did not file any answer or other written opposition to this motion (R. 72). The motion was argued before Judge McGuire on December 11, 1959 (R. 65-72). Petitioner's trial counsel informed Judge McGuire that he had made available to the court, to give testimony if necessary, not only petitioner but also Thompkins (R. 66). Judge McGuire acknowledged that as he understood the gist of the motion, "it is to the effect that a witness who appeared before the Grand Jury was promised if he went before the Grand Jury and testified falsely against the defendant in this case, he, himself, would not be prosecuted" (R. 69). Despite this, Judge McGuire said "I don't see any Constitutional question at all involved" (R. 70), and he did not take any testimony from Thompkins. The Government indicated it might furnish the grand jury testimony to Judge McGuire for examination (R. 72). Judge McGuire took the matter under advisement (R. 72).

By memorandum opinion dated December 22, 1959 (R. 28-30), Judge McGuire denied the motion. The opinion states that Judge McGuire meanwhile had made an examination of the grand jury proceedings of June 4, 1958, "with an eye toward the exclusion of the alleged perjurious testimony of the co-defendant [Thompkins]", and had been "satisfied that there was sufficient competent evidence to support the indictment herein challenged".

Judge McGuire's opinion proceeds on the basis that the allegations of Thompkins' perjury, supported by Thompkins' direct admissions of such perjury, must for purposes of the motion be assumed to be true. (Indeed, this was necessary since the District Court did not conduct any hearing to determine whether Thompkins' express admission of perjury was or was not true.) In holding the indictment nevertheless beyond challenge and not open to attack or further inquiry, Judge McGuire relied largely on his interpretation of this Court's ruling in *Costello* v. *United States*, 350 U.S. 359.

It appears that Judge McGuire had received the grand jury transcript—or at least parts of it—from the Government, which however refused to make such transcript available to defense counsel (R. 12). When the opinion showed that Judge McGuire had made a determination based on his *in camera* inspection, a motion was promptly filed on December 24, 1959, supported by a memorandum of points and authorities, to require that the grand jury transcript be made available to defense counsel (R. 12-13).[5]

[5] The motion itself is not part of the record in the Court of Appeals, since the Court of Appeals denied leave to appeal *in forma pauperis* without ever having ordered the record up from the District Court (compare note 2, *supra*). However, the motion as summarized here is described at R. 12-13, in the memorandum filed in the Court of Appeals by petitioner's present counsel.

In addition, a motion for reconsideration of the motion to dismiss the indictment was filed on December 29, 1959, was opposed by the Government, and was denied by Judge McGuire on January 4, 1960 (R. 73-74). The motion to obtain access to the grand jury transcript was argued on January 22, 1960, before Judge Holtzoff, who had presided at petitioner's first trial; Judge Holtzoff denied the motion, likewise relying on this Court's decision in *Costello* (R. 73-75).

3. *Grounds for disqualification of Judge Holtzoff.*

In the course of the January 22, 1960 argument on the motion, Judge Holtzoff made certain comments concerning petitioner which became the basis of motions, made at the outset of the second trial, that Judge Holtzoff should disqualify himself and have the case set for trial before another judge. Judge Holtzoff's comments appear in the following colloquy (R. 74-75) [emphasis added]:

> "Mr. Cohen [counsel for Coppedge]: Very briefly, the motion was based on perjurious implicating testimony, the evidence of the perjurious implicating testimony being letters written to the Court, of which I have purported copies and signed statements to this effect: The perjurer was a person named Clarence Thompkins. Your Honor may remember him from having the trial in your Court—he was the gentleman who refused, I believe, to even take the stand in the matter.
>
> "The Court [Judge Holtzoff]: I remember the episode very well. *He was just terrorized by Coppedge.*
>
> "Mr. Cohen: If Your Honor please, I am not alleging this; I am stating that this Thompkins, on signed statements, he asserts that he perjured himself.

"The Court: He asserts—*I imagine that statement was induced by Coppedge.* In any event, you cannot try cases twice or in bits. If the testimony was perjured, the jury will so find. We cannot first determine whether the Government's testimony is perjured and then try the case."

The second trial began before Judge Holtzoff on March 1, 1960 (R. 76). At its beginning, just after the jury had been empaneled, petitioner's court-appointed trial counsel made an unsuccessful effort to have Judge Holtzoff withdraw from the case, as follows (R. 77-78):

"Mr. Cohen: . . . May I ask Your Honor, and I ask most respectfully and at the request of my client, Mr. Coppedge, whether or not your Honor might consider withdrawing from the case?

"The Court: From what?

"Mr. Cohen: Withdrawing from the case.

"The Court: No, because the case was sent to me to try in the ordinary course of events. I don't think I have a choice in the matter. These things are not voluntary. It is unethical for a Judge to decline to try a case because it is unpleasant and impose an extra burden on some other Judge. No Judge should ever disqualify himself unless he is legally disqualified."

Shortly afterwards, on completion of opening statements of counsel but before taking of testimony had begun, petitioner's trial counsel made a second unsuccessful effort to persuade Judge Holtzoff to disqualify himself (R. 78):

"Mr. Cohen: If Your Honor please, we took the liberty of suggesting to the Marshal to hold the jury off while I address myself to the point we discussed

briefly at the bench. I wanted to do this in the presence of the defendant. As Your Honor knows, I was assigned—

"The Court: I don't care whether you are assigned or retained, because your authority is the same, and your duty is the same in either event.

"Mr. Cohen: I appreciate that my duty would be equal—

"The Court: Your duty would be equal, and the limitations are the same.

"Mr. Cohen: Yes, Your Honor. At a time most recent, I don't remember the date—it might show on the jacket—a motion came up before Your Honor in the case attacking the indictment. What I am addressing myself to is the problem as to whether or not, at the request of the defendant, the Court might not sit upon this matter.

"The Court: You have already brought that up at the bench conference, and I have disposed of the matter. You may not bring it up again.

"You may proceed.

"Mr. Cohen: For the record, if I may give the reasons—

"The Court: No, you may not. I don't know what you mean when you say, 'for the record.' Cases are tried before the Court and a jury; they are not tried 'for the record'.

"You may resume your seat, sir."

4. *The trial.*

Petitioner's second trial before Judge Holtzoff and a jury, on the first ten counts of the indictment (see Appendix B to this brief), took place on March 1, 2, 3, 4, 7 and 8, 1960 (R. 76-180). The evidence by which the prosecution sought to connect petitioner with the housebreaking and

larceny offenses charged in the first two counts of the indictment was admittedly (R. 156) entirely circumstantial, not direct; on these counts the jury acquitted petitioner. The evidence by which the prosecution sought to implicate petitioner in the transactions involving the three money orders on which counts three through ten are based[6] was in dispute and in many respects was in conflict with defense evidence; and the jury convicted petitioner on these counts.

During the trial a number of occurrences took place which give rise to additional substantial questions requiring appellate determination on the merits:

(1) *Issues as to use of the co-defendant Artis' first-trial testimony.* A number of these questions relate to the Government's use at the second trial (R. 90-129) of the first-trial testimony of the co-defendant Adam H. Artis. At the first trial Artis (who had pleaded guilty) had testified extensively for the Government, implicating petitioner in various of the offenses charged. At the second trial Artis was unavailable as a witness, being in North Carolina seriously ill with leukemia and with schizophrenia, paranoid type (R. 20, 77, 90-91, 100). Despite timely objections by defense counsel (R. 91, 93, 94-95, 97), Judge Holtzoff allowed Artis' first-trial testimony to be introduced. This

[6] Counts 3 and 4 relate to a money order which the co-defendant Artis attempted to cash with one Gevinson in a grocery store; counts 5, 6 and 7 relate to a money order which Artis cashed with one Borak in a liquor store; counts 8, 9 and 10 relate to a money order which the co-defendant Thompkins cashed with one Jackson in a delicatessen. All three money orders, before being filled in, had been among the blank money orders stolen during the housebreaking and larceny (Tr. 43-46, 53) which were the subject of counts 1 and 2, on which petitioner was acquitted. None of the three store proprietors gave testimony which implicated petitioner; for this the Government's case relied primarily on the testimony of its witnesses Artis and Quincy McCall.

included Artis' testimony on direct examination that on a Saturday afternoon in early December 1957, he met Coppedge, Tyler and Alexander in Tyler's car, which Coppedge was driving; that Alexander, in the presence of Coppedge and Tyler, said he had a check and "we can cash it if you do what I tell you to do", and that Alexander told Artis to go in the liquor store and say the money order came from his uncle in Roanoke; that they went in the liquor store; that Alexander made a purchase, signed the back of the money order (which is the basis of counts five, six and seven of the indictment); that the proprietor also gave Artis some change, and said Artis should come back the next day to get the remaining $20; that when Artis returned to the car, Coppedge and Tyler and Alexander were in the car and Artis gave Coppedge the money (R. 100-106). It also included Artis' testimony on direct that Alexander had then got a $50 money order and filled in Artis' name on it; that Artis and Alexander went into a grocery store while Tyler and Coppedge remained in the car; that Artis purchased some groceries and presented the money order (which is the basis of counts three and four of the indictment) to the owner, who said some checks had been stolen and picked up the receiver, whereupon Artis and Alexander ran out of the store, Artis leaving behind his identification card (R. 106-108).

Admissibility of the entire Artis first-trial testimony, under the unusual circumstances existing in this case, is one issue requiring appellate determination on the merits.

In addition, Judge Holtzoff excluded evidence showing that Artis, subsequent to the first trial, had entirely retracted his testimony implicating petitioner. The exclusion occurred when the defense sought to introduce into evidence an undated statement (reproduced at R. 22-23), which was not in existence and hence not available to coun-

sel at the time of the first trial (R. 91-92). This statement appeared to have been made subsequent to the first trial and to have been signed in two places by Artis. It wholly contradicted Artis' first-trial testimony implicating petitioner; and it recited that the statement "is made for the benefit of clearing my conscience and for justice, for I have just suffered a stroke." Judge Holtzoff initially said he would admit this recantation statement apparently signed by Artis if it were genuine, because he regarded its admission as "a matter of justice" even though he thought its admission "in violation of the rules of evidence" (R. 92, 93, 95), and he suggested the statement be turned over to the FBI for appropriate comparison of Artis' handwriting (R. 92, 94)—a suggestion to which defense counsel immediately agreed (R. 92). Then, however, Judge Holtzoff changed his mind and ruled that the recantation statement should be entirely excluded. Judge Holtzoff stated this was because only the signature was in Artis' handwriting and the statement was not dated or sworn to, and because the Judge recognized the body of the statement as being in "the handwriting of some gentleman who is an inmate of the penitentiary, because I have received papers from other prisoners in this handwriting" (R. 95-97). Thus Judge Holtzoff allowed the jury to hear Artis' extensive first-trial testimony implicating petitioner, but at the same time deprived the jury of all knowledge of the existence of what appeared to be Artis' subsequent total recantation. In other words, Judge Holtzoff excluded important probative evidence, offered to establish Artis' subsequent admissions that his prior testimony had been false and incorrect.

Furthermore, the defense called as a witness at this second trial one Bush (R. 142), who testified that he had been a cell mate of Artis and petitioner at Lorton Reformatory for ten days in February 1958, and that he had

overheard conversations between Artis and petitioner dealing with the charges involved in this case (R. 142-143). Upon the prosecution's objection (R. 143), Judge Holtzoff refused to permit Bush to testify to anything Artis had said or any admissions Artis had made directly contradicting Artis' first-trial testimony, "because he [Artis] has not been confronted with that statement—with anything that he said to this witness" (R. 143). Thus in this respect also, Artis' unavailability was unfairly used to block defense evidence of Artis' own statements proffered to contradict the Artis first-trial testimony which was read to the jury at this second trial.

Another issue arises out of Judge Holtzoff's failure and refusal to inform the jury of the deficiencies and the weaknesses Judge Holtzoff himself had noted in Artis' testimony at the first trial. At the first trial Judge Holtzoff had stated that "if requested, I shall instruct the jury that Artis . . . is not too reliable a witness" (R. 25), and in fact Judge Holtzoff then instructed the jury that "Artis was somewhat confused on the witness stand and you have a right to consider that in determining the weight to attach to his testimony" (R. 25). Judge Holtzoff also had instructed the jury that Artis "was a little uncertain as to whether he gave the money to Coppedge or Alexander because he seemed to waver back and forth" (R. 25). In addition, at the first trial Judge Holtzoff had stated (R. 25): "I want to ask the government a question which might perhaps shorten matters a little bit. To what extent are you going to rely on the Artis testimony? I would not send anybody to the penitentiary on the testimony of Artis. You would not either if you were a Judge."

At the second trial, however, when Artis was unavailable and Artis' first-trial testimony was read to the jury, Judge Holtzoff failed and refused to inform or instruct the jury concerning the deficiencies and weaknesses he him-

self had noted in Artis' testimony at the first trial. Judge Holtzoff's refusal, moreover, followed defense counsel's explicit request that this be done (R. 145).

Another issue arising in connection with the Artis testimony is whether Judge Holtzoff's failure to require the Government to produce the original of a statement in its possession, written out by FBI agent Darragh and signed by Artis, was error and in violation of the Jencks Act (18 U.S.C. §3500). Despite Jencks Act requirements, the prosecution failed to furnish to defense counsel the original of the statement Artis made to the FBI in Wilson County jail, North Carolina, on December 2, 1958, just after Artis had been arrested. Defense counsel duly and promptly requested this when the reading of Artis' first-trial testimony was completed at this second trial (R. 132); and several additional requests for the original were likewise made by the defense (R. 133, 149-151, 152-153, 155). The Government at first said "we expect it here shortly" (R. 133) and then that it was "en route" to Washington from the FBI's Charlotte office (R. 149, 154-155). Yet the Government never produced the original, although there was produced what the witness Darragh at first said "I assume" to be, and then claimed "to my knowledge" to be, a typed copy of the statement (R. 154). Judge Holtzoff did not require that the Government produce the original and he refused to hold the trial open until the original arrived, even though defense counsel made it clear that one reason for demanding the original was to use it as a basis for further cross-examination of Darragh (R. 151, 152, 153, 155).

Another issue in connection with the Artis matter is whether error was committed in receiving FBI agent Darragh's rebuttal testimony. Through Darragh the prosecution was permitted to introduce damaging hearsay to the effect that Artis immediately after arrest had made statements implicating petitioner as the person to whom Artis

gave the money Artis received from cashing one of the money orders. In particular, on redirect the prosecutor elicited from Darragh the following damaging hearsay testimony, over defense counsel's objections (R. 153-154):

> "Q. (By Mr. Flannery) To whom did he [Artis] say he gave the money?
>
> "A. He referred to a gentleman by the name of Mark [Coppedge] as having received the change.
>
> "Q. Mark. Had you ever heard that name before that day?
>
> "A. Not prior to my talking with Mr. Artis, no."

Moreover, the prosecutor in summing up strongly emphasized to the jury this item of inadmissible hearsay (R. 160, 166).

(2) *Issues as to the prejudicial unfairness of the prosecutor's summation.* The prosecutor's summation gives rise to important issues, requiring appellate determination on the merits, as to whether the prosecutor unfairly vouched for the veracity of Government witnesses. As a practical matter the trial's outcome turned largely on questions of credibility—whether the jury would believe, and beyond a reasonable doubt, the prosecution's witnesses even though in many respects their testimony was shaken or was contradicted by defense witnesses. Despite this circumstance the prosecutor in summing up vouched for the Government's witnesses. Thus with respect to two of his important witnesses, Quincy McCall and Hattie McCall, the prosecutor said (R. 157) [emphasis added]:

> "Then there is another aspect of this case which I think is most important, ladies and gentlemen, it bears your serious consideration: There is not a shred of testimony in this case from anyone that there was any

**reason why Quincy McCall or Hattie McCall or any other witness should lie about Coppedge's participation in this case. The testimony is to the contrary. As I recall, the only testimony relative to the type of relationship between Coppedge and the McCalls was this: They were friends. Now, that is important. Is there one shred of testimony that there was any animosity between Coppedge and the McCalls? Why, out of all the people in the District of Columbia who had some connection, one way or the other, in this case, would the McCalls pick Coppedge, and say that he is the prime mover in this case; he is the one who had the trunk sent there; he is the one who came there with the key and opened the trunk? Why would they say that? *There is only one obvious answer, so far as the Government is concerned, and I think that I am justified in saying that on the basis of the evidence—the only reason that they said it is because it is the truth.*"**

**And again, with respect to the Artis testimony, as sought to be buttressed by FBI agent Darragh's testimony, the prosecutor said (R. 160) [emphasis added]:**

**"Now, again, I say this is very significant: Agent Darragh didn't know anything about the facts in this case. He had merely received a request to have this man arrested, Artis arrested. Artis was arrested, and there came a time when Artis was in the jail in North Carolina, and Agent Darragh went over to talk to him. Now, there has been the suggestion, through the testimony in this case—certainly, I got the impression from Mr. Dietz's testimony—that when Artis was questioned in North Carolina, that words were put in his mouth, promises were made to him, and that he was induced, more or less, to involve Mark Coppedge**

in this case. But you heard from the testimony of Agent Darragh that he didn't know anything about this case. He didn't even know who Mark or Mark Coppedge was. You heard that he talked to this witness, Adam Artis, and Adam Artis volunteered to tell him, after being advised of his rights, what he knew about the case, and the agent wrote it down as Artis told it to him. Now, why—here, again, is one of those strange little coincidents in this case—why is it that in that statement that Artis gave to the F.B.I. agent as he wrote it down, why is it that the name Mark came into the case—Mark Coppedge? Why is it that Adam Artis, the poor unfortunate Adam Artis, who was used as a dupe in this case by this very clever fellow, why is it that Adam Artis told the F.B.I. agent that he was in the car, 'I went to the liquor store from the car, and I came out.' 'Who did you give the money to?' 'Mark.' *Now, there is a statement being taken by a completely disinterested F.B.I. agent who knew nothing about the case, nothing at all, and he tells you that Artis made the statement to him—doesn't that show you, ladies and gentlemen, that Artis is telling the truth in this case, and Alexander is not? Do you think that the F.B.I. agent got on the witness stand and deliberately perjured himself in this case? I think not, ladies and gentlemen. I point those things out to you for your serious consideration.*"

And again, the prosecutor said (R. 162-163) [emphasis added]:

"But Allen Alexander testified further, too. He testified that it was all his fault as far as the money order was concerned. I have discussed that previously. That he sent Artis in there, and that he got the money. Well, as I say, I have discussed that aspect of this case, but

> he said further that he had talked to the F.B.I., and, I believe he was the one—maybe it was Tyler—anyway, one of these people said that the F.B.I. had said, 'Well, now, look, you plead guilty in this case, you testify, and we'll be standing in your corner.' *Well, we know from the testimony of the F.B.I. that that just didn't happen, ladies and gentlemen, didn't happen in this case.*
>
> "Allen Alexander testified also that he told the F.B.I. that he had won two of these money orders in a crap game; said that he told that to the F.B.I. *However, when the agent from the Federal Bureau of Investigation was questioned in that regard, he denied that Allen Alexander had told him that at all. We know that neither Alexander nor Tyler made any statement.*"

And again, the prosecutor said (R. 163):

> "Another witness called by the defendant was one, Hazel Lee Lewis, another inmate in the jail. . . . I think, certainly, that witness was not being truthful with you. He was trying to act from the witness stand. He almost won an Oscar up there."

(3) *Issues as to Judge Holtzoff's charge.* In addition to Judge Holtzoff's refusal to inform the jury of the deficiencies and weaknesses which he himself had noted in Artis' testimony at the first trial (pages 17-18, *supra*), two other issues raised by the charge require appellate determination on the merits. As to both of these, no objection was made at the trial and accordingly a matter for appellate determination is whether the "plain error" doctrine applies.

First, Judge Holtzoff charged that the jury might convict solely on the basis of uncorroborated testimony of an accomplice (R. 171):

> "The testimony of an accomplice must be received with care and scrutinized with caution. I do not mean by that that the accomplice may not be believed. You have a right to believe the testimony of an accomplice; but before deciding whether or not to believe him, you must scrutinize his testimony with care and caution. In fact, the law permits the jury to convict a person on the sole and uncorroborated testimony of an accomplice if the jury decides to believe the accomplice."

Thus under the instructions it was not necessary for the jury to find any credible corroborative evidence if the jury chose to rely solely on the uncorroborated testimony of an accomplice. Judge Holtzoff also instructed that Artis was an accomplice (R. 170-171); this made it possible for the jury to convict, if they so wished, on the basis of their believing nothing but the uncorroborated testimony of Artis alone.

Second, in dealing with counts 7 and 10—the alleged offenses under 18 U.S.C. §2314, involving interstate transportation of a forged security—the charge clearly fails and omits to instruct the jury that, as an essential element of the offense, the Government must also establish knowledge on the part of the defendant that the security was falsely made and forged (R. 177-179).[7] Moreover, somewhat comparable inadequacies and lack of clarity appear in the portions of the charge (R. 175-177, 178-179) dealing with the elements of the offenses of forgery, attempting to

[7] On January 12, 1961, after the petition for certiorari was filed in this case, the District of Columbia Court of Appeals held in *Barry* v. *United States*, 109 App. D.C. 301, 287 F.2d 340, that such an omission, in a substantially identical charge given by Judge Holtzoff in the *Barry* case, was a fatal omission which constituted plain error requiring reversal even though the point had not been raised either at the trial or by the briefs or argument on appeal.

utter and uttering, which are the basis of counts 3, 4, 5, 6, 8 and 9.

After the jury's verdict acquitting on the housebreaking and larceny counts but finding petitioner guilty on counts 3 through 10, Judge Holtzoff on March 11, 1960 (judgment filed March 14, 1960) imposed concurrent sentences of twenty months to five years on each of counts 3 through 10 (R. 183, 6).

5. *Attempts to obtain an appellate determination on the merits.*

Petitioner's timely application to appeal *in forma pauperis* (R. 6-7) was on March 22, 1960, denied by Judge Holtzoff, who certified that the appeal "is frivolous and not taken in good faith" and added: "the defendant has had two trials and the jury convicted him both times on the counts on which he was sentenced" (R. 7). Thereupon petitioner, *pro se*, on April 15, 1960, filed timely petition with the Court of Appeals for leave to appeal *in forma pauperis* (R. 1-4). One issue raised related to Judge Holtzoff's refusal to disqualify himself; petitioner stated that the ground for asking Judge Holtzoff to disqualify himself was that in a hearing on a preliminary motion on January 22, 1960, shortly before the second trial,

> "Judge Holtzoff made the uncalled for, un-proven, and highly prejudiced remarks, that petitioner had terrorized a former government witness. Since such a charge has never been placed against, or proven against petitioner, the remarks by Judge Holtzoff show that he was prejudiced against petitioner even before the trial" (R. 3).

Petitioner further stated that when the motion had been presented "Judge Holtzoff bluntly refused to hear the peti-

tioner's reasons for presenting the motion before denying it" (R. 3-4).

On April 20, 1960, the Court of Appeals appointed the undersigned as petitioner's counsel (R. 5). On June 15, 1960, a 30-page memorandum in support of the petition to appeal *in forma pauperis* was filed in the Court of Appeals, setting forth three separate groups of substantial questions which appeared to be involved in the appeal (R. 5-30). Details will be discussed in the Argument section of this brief; the issues raised involved (A) the group of substantial questions relating to the validity of the indictment (R. 8-17), (B) the substantial questions relating to Judge Holtzoff's summary denial of motions that he disqualify himself (R. 17-19); and (C) substantial questions as to prejudice resulting from the prosecution's use of the co-defendant Artis' first-trial testimony (R. 19-27). The memorandum likewise set forth reasons why, in counsel's opinion, a transcript was necessary in order for petitioner's appeal to be properly evaluated by counsel and presented to the Court of Appeals (R. 7-8, 27).

On June 16, 1960, the Government answered that it appeared appropriate to furnish the transcript at Government expense; but the Government urged that until after the transcript became available, and petitioner's counsel had then filed such supplemental memorandum as he may deem appropriate, the Court of Appeals should hold in abeyance action on the petition for leave to appeal *in forma pauperis* (R. 31). A reply filed June 17, 1960 (R. 32-33) urged that leave to appeal *in forma pauperis* should be granted without further delay, since it was sufficiently clear that the appeal involved at least some substantial questions no matter what the transcript might disclose. It was further urged that the procedure suggested by the Government would be wasteful and unnecessarily pro-

longed; that it would involve a serious imposition on the time and energies of the Court of Appeals, a significant delay in the handling of criminal cases on appeal, an unwarranted enlargement of the elapsed time between the date of sentence and the date of final disposition of the appeal, and a fragmentation of the appellate disposition of *in forma pauperis* cases which would make the appellate process a kind of obstacle course for an indigent appellant which is wholly unlike the situation confronting a non-indigent appellant able to pay his way.

On July 1, 1960, the Court of Appeals directed that the stenographic transcript be prepared at the expense of the United States, and allowed the Government ten days after the filing of such transcript for submitting an opposition to the petition for leave to appeal *in forma pauperis* (R. 34).

The transcript accordingly became available on August 15, 1960. The Government, having applied for an extension of time, filed in the Court of Appeals on September 2, 1960, an opposition to the petition to appeal *in forma pauperis* (R. 35-40). The Government's opposition asserted that "none of the questions raised by petitioner are sufficiently substantial to warrant an appeal in forma pauperis" (R. 36), and that the questions "are not sufficiently substantial for this Court of Appeals to grant an appeal in forma pauperis" (R. 39).

On September 8, 1960, the undersigned filed a 26-page reply on petitioner's behalf (R. 40-63). The reply showed that the transcript had underscored the substantiality of the three groups of questions raised initially before the transcript became available (R. 41-54), and also that the transcript had brought to light two new substantial questions each of which called for appellate determination on the merits—namely, whether corroboration should be re-

quired to support a conviction based on testimony of an accomplice (R. 54-58), and whether the prosecutor had unfairly vouched for the veracity of Government witnesses (R. 58-62). In addition, the reply urged that, in the light of what the transcript actually showed, one of the substantial questions initially advanced—namely, Judge Holtzoff's failure and refusal to recuse himself—was error so manifest as to warrant summary reversal of the conviction (R. 44-50, 63).

The Court of Appeals did not hear oral argument on the petition to appeal *in forma pauperis*. It did not order the record in the case to be designated for purposes of appeal or transmitted to it from the District Court. It did not allow the case to be briefed on the merits, nor orally argued on the merits. It did not in any other manner purport to give the case a full appellate review. Instead, on November 4, 1960, it entered an order "that the petition for leave to prosecute an appeal in forma pauperis is denied" (R. 64). Chief Judge Miller and Judge Bastian concurred in the order; dissenting was Judge Bazelon, who "would grant the petition."

The petition for certiorari was filed *in forma pauperis* in this Court on November 16, 1960. The Government filed a brief in opposition on January 13, 1961, and petitioner's reply was filed on January 18, 1961. Among other things, the reply invited attention to the additional issue requiring appellate determination in the light of the intervening Court of Appeals decision in *Barry* v. *United States* (page 23, *supra*).

Action on the petition for certiorari apparently was held in abeyance pending disposition of *Lurk* v. *United States*, 366 U.S. 712, which involved similar questions as to *in forma pauperis* procedure on direct criminal appeals in

the District of Columbia.* Shortly after this Court's decision reversing the Court of Appeals in *Lurk*, certiorari was granted in the present case on June 19, 1961 (R. 184). 366 U.S. 959.

## Summary of Argument

In the Court of Appeals an abundant showing was made on petitioner's behalf that the appeal raised issues which were "not plainly frivolous". The refusal of the Court of Appeals to allow the appeal to be heard and determined on the merits was a plain departure from the standards expressed by this Court in *Ellis* and related cases. It involves, moreover, a gross and unlawful discrimination against petitioner because of his indigence.

This Court might accordingly remand the case to the Court of Appeals for an initial determination there of all the issues on the merits. Strong considerations exist under the circumstances of this case, however, for this Court instead to make an appellate determination of the merits at this time. Accordingly the issues will be fully briefed on the merits, so that the case can be definitively disposed of here, without further delay, if this Court deems such action to be just under the circumstances.

The District Court's denial of the motion to dismiss the indictment raises a number of important questions and involves a serious misunderstanding of this Court's *Costello* decision. *Costello* held that an indictment is not subject to attack when it is based solely on hearsay evidence. But *Costello* did not in any way preclude attack on an indictment when a concrete and specific showing is made before the trial that the grand jury based its action on

* A brief *amicus curiae* on behalf of this petitioner was filed in *Lurk*, urging reversal.

important testimony which was false and perjured. Moreover, an indictment based on substantial false and perjured testimony is not, as the District Court thought, automatically salvaged by the fact that "other competent evidence" implicating petitioner may have been before the grand jury. The test rather is whether it can be known with reasonable certainty that the grand jury would have returned the indictment anyway, even if the substantial perjured testimony implicating petitioner had not been presented to it or even if the grand jury had known that such testimony was perjured; and here it cannot properly be concluded that the grand jury would have returned the indictment anyway. The grand jury transcript, which the District Court examined *in camera*, was improperly, and in this case without any justification, withheld from defense counsel, depriving the defense of the opportunity to have the necessary facts relating to this matter; and in any event, at the very least an appellate *in camera* examination is required, but has never been made, to determine the correctness of the District Court's conclusion that in fact there was other competent evidence before the grand jury. Finally, and of great importance, the motion papers required that the District Court should have made a factual inquiry—which it totally failed to do—into whether Government agents were responsible for inducing the false and perjured testimony for presentation to the grand jury.

Judge Holtzoff should have granted the motions that he disqualify himself and permit the case to be tried before another judge. His hostility to petitioner and petitioner's case—as manifested by his comments during an oral argument on a motion shortly before this trial began—made it highly inappropriate for him to proceed to try the case, and particularly so in the light of defense objections.

Serious prejudicial errors were committed in connection with the prosecution's being allowed to use extensive testi-

mony implicating petitioner which had been given at the first trial by the co-defendant Artis, who was unavailable as a witness at this second trial. Judge Holtzoff's exclusion of Artis' subsequent recantation, as well as of Artis' other contradictory admissions, was highly prejudicial and unfair to petitioner. Indeed, it means that, by reason of the accident of the witness' intervening death or other unavailability, first-trial testimony shall be unconscionably immunized against subsequent impeachment, even though the impeachment takes the form of a total written recantation by the witness which shows conclusively that at the first trial he was a liar and a perjurer. Judge Holtzoff further erred in failing and refusing to inform the jury of the deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial. Judge Holtzoff erred, and failed to meet his obligations under the Jencks Act, when he refused to require the prosecution to produce the original of the Artis statement of December 2, 1958. He likewise erred in admitting damaging hearsay against petitioner on the Artis matter. Indeed, under the unusual circumstances of this case, when the Artis matter is looked at as a whole it becomes clear that Judge Holtzoff should have sustained defense objections to the entire Artis first-trial testimony.

The prosecutor in his summation, by inexcusably vouching for the veracity of Government witness, deprived petitioner of a fair trial.

Judge Holtzoff's charge was defective in that it permitted conviction to be based on the uncorroborated testimony of an accomplice (here Artis)—a rule of law which has been widely followed in the lower federal courts but which should be rejected by this Court, particularly in the light of modern developments in the criminal law. Judge Holtzoff's charge was also fatally defective in omitting to define an essential element of the offenses.

For these reasons—separately, and even more so in the aggregate—the merits of the appeal are with petitioner and his conviction should be reversed. In addition, appropriate directions should be given to the District Court with respect to the motion to dismiss the indictment.

## ARGUMENT.

### I.

### The Court of Appeals' Refusal to Allow an Appeal in Forma Pauperis and to Hear and Determine the Appeal on the Merits Constituted a Plain Departure From Established Law.

The fair and just handling of *in forma pauperis* cases constitutes one of the major problems confronting the courts in the administration of federal criminal justice. This is particularly true within the District of Columbia Circuit, where *in forma pauperis* business is especially heavy.

To provide all the federal courts with clear and unequivocal guidance as to the standards applicable to allowance of *in forma pauperis* appeals, this Court held in *Ellis* v. *United States*, 356 U.S. 674, 674-675, that:

> "The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith'. 28 U.S.C. §1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley* v. *United States*, 354 U.S. 521. The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a

nonindigent litigant, Fed. Rules Crim. Proc. 39(a), the request of an indigent for leave to appeal in forma pauperis must be allowed."

In far too many cases the teachings of *Ellis*, instead of finding a sympathetic reception in the District of Columbia Circuit, have met with outright rejection. Time and again, as in *Ellis*, this Court has found it necessary and appropriate to take corrective action reversing the District of Columbia Circuit, so that the Court of Appeals would be required by this Court's specific direction to hear and determine on the merits an *in forma pauperis* criminal appeal. *Edwards* v. *United States*, 355 U.S. 36; *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578; *Smith* v. *United States*, 358 U.S. 281; *Smith* v. *United States*, 361 U.S. 38; *McAbee* v. *United States*, 361 U.S. 537; compare *Willis* v. *United States*, 362 U.S. 216. Most recent in the series is *Lurk* v. *United States*, 366 U.S. 712, decided near the end of last term. In every one of these cases the District of Columbia Court of Appeals had cut off an indigent appellant from having his appeal heard and determined on the merits—just as it has done with this petitioner—and in every instance this Court reversed.

The fact that so many reversals have been necessary—and that despite them the Court of Appeals has continued on its erroneous course of conduct—is eloquent proof of the gross misconception which prevails in the District of Columbia Circuit concerning applicable legal standards on this subject. Abundant showing was made in the Court of Appeals that this petitioner's appeal raised questions substantial and clearly non-frivolous. But the Court of Appeals—despite the wide gap which has been shown to exist between its views and the unanimous views of this Court—has nevertheless persisted in applying its own erroneous

views as to the governing standards. In this area the District of Columbia Court of Appeals repeatedly has manifested a propensity to differ rather than defer.

If petitioner had been a non-indigent appellant, his appeal would in fact have been heard and determined on the merits by the Court of Appeals. For example, it is understood that there are very few cases in recent years—indeed virtually none at all—where the District of Columbia Court of Appeals dismissed as frivolous a direct criminal appeal brought to it on a paid basis by a non-indigent appellant.* In sharp contrast, during the fiscal year 1960 alone there were about 30 direct criminal appeals by indigent appellants in which the District of Columbia Court of Appeals denied leave to appeal *in forma pauperis*. No principles of natural selection—except those fostered by basically discriminatory practices—would account for a situation in which indigent appellants so frequently are held to be presenting frivolous appeals from criminal convictions but appellants able to pay their way are never, or virtually never, held to be doing so.

Indeed, anyone who reads the month-by-month and year-by-year output of opinions by the District of Columbia Court of Appeals in non-indigent criminal cases would have no doubt that petitioner's appeal, if it had come from a non-indigent appellant, would have been fully heard and determined on the merits. Even a casual inspection will

---

*While the search made has not been exhaustive, only one instance has been found in recent years where the Court of Appeals for the District of Columbia Circuit dismissed as frivolous a non-indigent's direct appeal in a criminal case. This was in the recent case of *Brown* v. *United States*, 293 F.2d 149 (1961)—and even in this one case the appeal was dismissed only after being fully briefed and orally argued on the merits. Moreover, in *Young* v. *United States*, 105 App. D.C. 415, 416, 267 F.2d 692, 693 (1959), the Court of Appeals itself stated, as to criminal appeals, that "Prepaid appeals are rarely dismissed."

show that the Court of Appeals' opinions in its non-indigent criminal appeals are filled with appellate determinations on the merits of issues far less substantial than the issues petitioner tendered.

These circumstances emphasize the gravity of the unlawful and improper discrimination being practiced against petitioner—as it has also been practiced against Ellis and Lurk and others in the District of Columbia—because of indigence. This is discrimination of the type which the Fourteenth Amendment prohibits the States from practicing. *Griffin* v. *Illinois*, 351 U.S. 12; *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Ross* v. *Schneckloth*, 357 U.S. 575; *Burns* v. *Ohio*, 360 U.S. 252; *Douglas* v. *Green*, 363 U.S. 192; *McCrary* v. *Indiana*, 364 U.S. 277; *Smith* v. *Bennett*, 365 U.S. 708. "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. . . . [A]t all stages of the proceedings the Due Process and Equal Protection Clauses [of the Fourteenth Amendment] protect persons like petitioners from invidious discriminations." *Griffin* v. *Illinois*, *supra*, 351 U.S. at 18. This type of discrimination is at least equally violative of the Fifth Amendment's Due Process Clause, and at least equally violative of the entire spirit of fairness and equality upon which our judicial institutions are founded.

The Court of Appeals has inflicted on petitioner because of his indigence a denial of justice which should be made impossible under a Constitution whose Preamble recognizes the great purposes of our free society to "establish Justice" and to "secure the Blessings of Liberty". The poor as well as the rich are entitled to have their criminal

appeals fully heard and determined on the merits—at least when issues "not plainly frivolous" are raised by the appeal. In the administration of federal criminal justice there is no room for discriminatory procedures which would relegate the indigent to a kind of second-class citizenship. Indigent appellants must not be made beggars for the justice which every non-indigent appellant can obtain from the Court of Appeals as a matter of regular course.

A word should be added concerning the brief in opposition which the Government filed in this Court in the present case, comparable to what it also argued in this Court in *Lurk*. The Government took the wholly spurious position that petitioner's appeal had "in effect already been granted and considered" by the Court of Appeals and "in effect the case was presented to the court below on its merits and was presumably disposed of on that basis". The simple answer to this is that plainly it is not so. Since such argument by the Government has now been totally rejected by this Court's decision in *Lurk*, perhaps the Government will not renew it here in the brief on the merits. In any event, no amount of misdescription by the Government can alter the fact that in this case, as in *Lurk*, what the Court of Appeals did was to deny, and not to grant, an appellate review of the merits. The Government tendered its strange assertion to this Court despite all the facts: the Court of Appeals did not order that leave to appeal be granted, but instead ordered that such leave be denied; the Court of Appeals did not order the record in the case to be designated for purposes of appeal or to be transmitted to it from the District Court for review; the Court of Appeals did not allow the case to be briefed on the merits; the Court of Appeals did not allow the case to be orally argued on the merits, or even otherwise; the Court of Appeals did not render any opinion or order on the merits; the Court of Appeals did not express any views

whatever on the merits of any of the issues raised; the Court of Appeals did not say or show that it had given any particular consideration to any of the issues raised; and the Court of Appeals did not in any other manner purport to give the case full appellate review.

In short, the Court of Appeals has been following a course of action which would scuttle *Ellis* and would defeat the great principles of Equal Justice under Law. A long line of decisions establishes that this cannot be accomplished as long as this Court sits.

---

It is evident that petitioner has been denied the appellate review on the merits to which he clearly is entitled. As has been shown, it was enough under *Ellis* that the issues presented to the Court of Appeals be "not plainly frivolous". That the issues were "not plainly frivolous" appears in the record printed for this Court's use and will be discussed, as to each issue, in succeeding portions of this brief.

One possible disposition of the case would be to remand it to the Court of Appeals for initial determination there of all the issues on the merits. That is the course which this Court has followed in *Lurk* and in various other cases. Another possible disposition would be for this Court to make its own appellate determination on the merits of some, or perhaps all, of the issues involved. That is the course which this Court has followed in cases such as *Holiday* v. *Johnston*, 313 U.S. 342, and *Pollard* v. *United States*, 352 U.S. 354, where leave to appeal *in forma pauperis* had likewise been denied by the courts below. Considerations which seem strongly persuasive towards the latter course will be discussed (pages 69-70, *infra*). In any event, in order to put the case in a posture where the appellate determination could be rendered by this Court

on the merits at this time, the various issues in the case will be fully argued on the merits in this brief, and not merely presented in the somewhat more abbreviated form which would be adequate to establish their "not plainly frivolous" nature.

---

## II.

### Numerous Prejudicial Errors Were Committed in Denying Petitioner's Motion to Dismiss the Indictment.

The errors on this phase of the case must be assessed in the light of the issues raised by the motion and its supporting documents. These issues were, first, that the indictment had been returned by the grand jury as a result of testimony by Thompkins, which Thompkins now stated in writing to have been false and perjured, and second, that such false and perjured testimony by Thompkins had been induced by Government agents (pages 7-9, *supra*).

A. *The indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured.*

To the extent that Judge McGuire relied on some principle that the nature of the evidence before the grand jury is not subject to any inquiry whatsoever for the purpose of testing the validity of the indictment, his ruling goes far beyond existing precedents and into an area where the law appears to be largely unresolved. *Costello* v. *United States*, 350 U.S. 359, was cited for support. *Costello*, however, was a very different case; as this Court said, 350 U.S. at 359, it presented for decision the single question whether a defendant might be required to stand trial and a conviction might be sustained where the only evidence presented to the grand jury which indicted him was hear-

say evidence. This Court reviewed the history of the grand jury as an institution and concluded that the fact that all the evidence presented to the grand jury is hearsay, which would not be admissible at the trial, does not defeat the validity of the indictment. In other words, grand jury proceedings are not to be reviewable for the purpose of ascertaining whether they have been conducted in accordance with the rules of evidence; there is no substantive requirement that the rules of evidence be strictly followed in grand jury proceedings, "in which laymen conduct their inquiries unfettered by technical rules." 350 U.S. at 364. Accordingly this Court said, 350 U.S. at 363, and later repeated in *Lawn* v. *United States*, 355 U.S. 339, 349-350:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The policy considerations supporting this result would appear to be essentially inapplicable to a case where it affirmatively appears that false and perjured testimony constituted the basis—or a substantial basis—for the action taken by the grand jury.[10] The issue raised by perjurious

---

[10] Moreover, to reinforce the "not plainly frivolous" nature of this issue, it was emphasized to the Court of Appeals (R. 12) that an elaborate review of federal decisions appears in an Annotation in 100 L.Ed. 404-412 (following the *Costello* opinion), entitled "Competency or Sufficiency of Evidence Before Grand Jury as Affecting Validity of Indictment or Conviction in Federal Court". The cases there collected do not reflect any express line of authority in the federal courts on the question whether, when there is a showing that important evidence brought before the grand jury was false and perjured, the indictment should be dismissed. No decision has been found—and none was cited in the Government's opposition filed in the Court of Appeals—either in this Court or in the District of Columbia Court of Appeals or in the Court of Appeals of any other circuit, whether before or after *Costello*, which forecloses or indeed even passes upon such question.

testimony given before the grand jury is not simply a question as to technical rules of evidence. Indeed there is nothing very technical about this at all; laymen are perfectly capable of understanding and reacting to the phenomenon of having been lied to. Rather the issue is what the interests of justice require when before the trial the perjury is discovered and it is shown that the grand jury has relied substantially on wilfully false and perjured testimony in making up its mind to return the indictment. Moreover, the present case is not one where there are merely some vague "unsupported suspicions," *Lawn* v. *United States, supra*, 355 U.S. at 350, of such perjury. Thompkins' direct and specific written statements were a part of the motion; no denial was filed by the Government; and in addition, defense counsel made Thompkins available as a witness if the court should want to take his testimony (page 9, *supra*). When such a situation is made duly manifest to the court before the trial has begun—and indeed before the statute of limitations has run, so that fresh grand jury consideration of whether a new indictment ought to be returned against the particular defendant is in no way precluded—then the proper administration of criminal justice requires that the challenged indictment be set aside.

B. *An indictment based on substantial false and perjured testimony is not automatically salvaged by the fact that "other competent evidence" may have also been before the grand jury.*

As noted, Judge McGuire after an *in camera* inspection, concluded that the grand jury had sufficient other competent evidence against petitioner to support including petitioner in the indictment (page 10, *supra*). Challenge is here made, as it was in the Court of Appeals (R. 12-14), to the standard Judge McGuire applied—namely, that where signifi-

cant false and perjured testimony given before the grand jury has formed a substantial basis for the indictment, nevertheless such perjury is immaterial so long as there was presented to the grand jury some other competent evidence implicating the particular defendant.

A closer formulation of the proper criterion in such a case would appear to be whether it can be known with reasonable certainty that the grand jury would have returned the indictment anyway—even if the false and perjured testimony had not been brought before it or even if the grand jury had known that in fact such testimony was false and perjured. If that is the more appropriate criterion, then this indictment should have been dismissed against petitioner and the matter sent back to a grand jury for fresh consideration without the use of Thompkins' wilfully false and perjured testimony implicating petitioner. Moreover—to borrow the language of this Court and of the Court of Appeals in a somewhat different situation, *Griffin* v. *United States*, 336 U.S. 704, 709; 83 App. D.C. 351, 353, 183 F.2d 990, 992 (1949)—on this record it would certainly be "too dogmatic, on the basis of mere speculation, for any court to conclude" that the grand jury would not have attached significance to the fact that Thompkins' important testimony was false and perjured if such fact had been available to the grand jury. Indeed, "we cannot know whether the grand jury would have included in its indictment a charge" against this petitioner, compare *Stirone* v. *United States*, 361 U.S. 212, 219, if the substantial perjured testimony of Thompkins had not been brought before it.

This Court has said with respect to the situation of false and unreliable testimony of an important prosecution witness at a trial: "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them". *Mesarosh* v.

*United States*, 352 U.S. 1, 14. Equally, the government of a strong and free nation does not need indictments based upon such testimony, and it cannot afford to abide with them.

C. *The grand jury transcript was erroneously withheld from defense counsel.*

As already stated (pages 10-11, *supra*), the District Court denied defense counsel's motion to inspect the grand jury transcript. This effectively and erroneously deprived the defense of an opportunity to make such argument as might be appropriate, on the basis of actual examination of the transcript, to the effect that Thompkins' false and perjured testimony constituted the sole basis, or virtually the sole basis, for the grand jury's having indicted petitioner.

Grand jury proceedings normally are surrounded by secrecy. But such secrecy is to be broken where there is a compelling necessity, or where there is a showing of good cause—such as, that without the transcript the defense would be greatly prejudiced or an injustice would be done. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-684; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395; *DeBinder* v. *United States*, 292 F.2d 737, 739 (D.C. Cir. 1961); compare *Parr* v. *United States*, 265 F.2d 894, 901-904 (5th Cir. 1959), reversed on other grounds, 363 U.S. 370. "After the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234.

Here the ends of justice required it. Thompkins had expressly admitted his perjury, so no proper purpose could have been served by keeping Thompkins' grand jury testimony undisclosed. The case had, moreover, already gone through a first trial (with conviction reversed by the Court

of Appeals), so that continued secrecy of the grand jury transcript as to other witnesses would not even have served the purpose of enabling the prosecution to obtain the usual benefits of surprise in presenting its evidence at the trial. Under the circumstances, there appear to have existed no significant considerations in favor of secrecy which should have outweighed the need of disclosure in order to enable the defense to have the facts reasonably necessary for the effective presentation of its position. Defense counsel showed "a particularized need" for the grand jury minutes, *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 400, and accordingly the minutes should have been made available to him.

D. *In any event, appellate review is required to determine whether the District Court erred in determining there was sufficient other competent evidence before the grand jury.*

Even if refusal to disclose the grand jury transcript to defense counsel were sustained, the proper exercise of appellate responsibilities requires that an appellate court review the correctness of the District Court's *in camera* determination that there actually was other competent evidence implicating petitioner before the grand jury. The cases just cited show that a trial judge's discretion in deciding whether to disclose the grand jury transcript is not absolute, and that it is subject to appellate review. Moreover, where the trial court examines the grand jury transcript *in camera,* and denies it to the defense, the minimum obligation of the appellate court is to make a similar *in camera* examination to determine whether the trial court's conclusion was right or wrong and whether the trial court's discretion was abused. *United States* v. *Spangelet,* 258 F.2d 338, 341-342 (2nd Cir. 1958); *United States* v. *Zborowski,* 271 F.2d 661 (2nd Cir. 1959); *United States* v. *Mc-*

*Keever*, 271 F.2d 669, 672-673 (2nd Cir. 1959); *United States* v. *Hernandez*, 282 F.2d 71 (2nd Cir. 1960); compare *Palermo* v. *United States*, 360 U.S. 343, 355; *Rosenberg* v. *United States*, 360 U.S. 367, 369. This is required by the need for both fairness and the appearance of fairness. Even now, the petitioner's counsel cannot know what is in the grand jury transcript. Petitioner must accordingly rely upon careful appellate scrutiny *in camera* of the grand jury transcript,[11] or else there would be no appellate review at all on the questions whether, apart from Thompkins' perjury, there was indeed any other evidence before the grand jury, and if so whether—under whatever criterion may be applicable—such evidence was adequate to sustain the indictment against the challenge made.

E. *In any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether Government agents were responsible for inducing false and perjured testimony by Thompkins for presentation to the grand jury.*

The motion to dismiss the indictment, while the allegations in the exhibits attached to it were perhaps somewhat inartistically expressed (pages 7-9, *supra*), sufficiently raised this question so that the District Court should have made an inquiry into the facts. Indeed the oral argument on the motion makes it clear that Judge McGuire was satisfied such issue was squarely raised, since he said that as he understood its gist, "it is to the effect that a witness who appeared before the Grand Jury was promised if he went before the Grand Jury and testified falsely

[11] Since the Court of Appeals denied leave to appeal in forma pauperis without ever providing for the record to be designated or transmitted to it by the District Court (compare note 2, *supra*), the grand jury transcript was never—so far as appears—brought before the Court of Appeals even for an *in camera* examination.

against the defendant in this case, he, himself, would not be prosecuted" (R. 69; page 9, *supra*). Yet, as noted (page 9, *supra*)—and even though no written denial or other answer had been interposed by the Goverment—Judge McGuire elected to make no inquiry into the actual facts and did not call Thompkins to testify despite the fact that Thompkins was available to the court as a witness on that day.

The long line of decisions beginning with *Mooney* v. *Holohan*, 294 U.S. 103, and extending through *Alcorta* v. *Texas*, 355 U.S. 28, *Napue* v. *Illinois*, 360 U.S. 264, and *Wilde* v. *Wyoming*, 362 U.S. 607, have established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must be set aside under the Due Process Clause; that the same result obtains when the State, although not soliciting false evidence, allows false evidence to go uncorrected when it appears; and that there is a constitutional requirement for such issues to be cognizable not merely by direct appeal but also by collateral attack upon the conviction. Although no case has been found expressly deciding whether these principles likewise apply in passing upon the validity of an indictment, as a matter of principle the taint would appear to be comparable. The obligation to wipe out the taint by dismissing the indictment is equally compelling, both as a matter of constitutional law under the Due Process Clause of the Fifth Amendment and as a matter of proper judicial supervision over the administration of criminal justice in the federal courts.

Accordingly, on the present record the District Court should have made inquiry into the facts—which it totally failed to do—to determine whether Government agents were in fact responsible for inducing Thompkins' false and perjured testimony, implicating petitioner, for presenta-

tion to the grand jury. If they were, the indictment thereupon returned against petitioner is most clearly "a fruit of the poisonous tree", *Nardone* v. *United States*, 308 U.S. 338, 341, and it would be unconscionable for the indictment of petitioner to be allowed to stand, particularly in a case such as this where timely challenge was made to it before the trial.

Indeed, if one were to accept the argument of complete non-reviewability made by the Government's opposition filed in the Court of Appeals, then this would mean that a federal prosecutor could knowingly and wilfully induce a witness to give false and perjured testimony before a grand jury; that such false and perjured testimony, knowingly and wilfully induced by the prosecutor, could constitute the sole evidence connecting the defendant with the alleged offense and the sole basis for the grand jury's indicting the defendant, and yet the indictment would be wholly immune from attack in the courts. If the grand jury's "most valuable function" is "not only to examine into the commission of crimes, but to stand between the prosecutor and the accused", *Hale* v. *Henkel*, 201 U.S. 43, 59; *Hoffman* v. *United States*, 341 U.S. 479, 485, then surely it is essential to prevent the grand jury's processes from being debased by such a prosecutor. Otherwise there would be put into the hands of an evil or corrupt or overzealous prosecutor an unreviewable power not only to snuff out the rights of the defendant but also to impose the unconscionable results upon both an unsuspecting grand jury and the court itself. It would make the grand jury and the court serve as instruments for such a prosecutor in carrying out his evil design, instead of as the bulwarks of a free society in the fair and impartial administration of justice.

Neither *Costello* nor *Lawn* nor (so far as is known) any other federal decision has ever held or intimated that such a far-reaching proposition can be the law. Plainly it should not ever become the law.

## III.

### Judge Holtzoff Should Have Disqualified Himself and Permitted the Case to Be Tried Before Another Judge.

The circumstances surrounding Judge Holtzoff's summary denial of motions that he disqualify himself have been related (pages 11-13, *supra*). From them it appears that Judge Holtzoff, shortly before the second trial, had declared in open court that petitioner had "terrorized" a Government witness, Clarence Thompkins, and Judge Holtzoff also had declared that, as to Thompkins' recantation statement, "I imagine that statement was induced by Coppedge."

In the circumstances the interests of justice clearly required that Judge Holtzoff recuse himself and allow the case to be tried before another judge.

The Government's opposition filed in the Court of Appeals disagreed with petitioner's position on two grounds (R. 37-38). Both of the Government's grounds were demonstrably devoid of merit; and in any event, neither one of them detracted in the slightest from the substantiality of the issues presented for an appellate determination on the merits.

First, said the Government (R. 37), no statutory affidavit of prejudice had been filed under 28 U.S.C. §144. But this is by no means the only proper way, under all circumstances, for questions as to disqualification for prejudice to be given consideration. Indeed, in *Offutt* v. *United*

*States*, 348 U.S. 11, as in *Cooke* v. *United States*, 267 U.S. 517, 539, this Court itself directed that a second trial should be before a different judge. Other cases disclose situations where motions, or appropriate protestation on appellate review, have been deemed adequate and sufficient methods for raising the issue of whether the requisite standards have been adhered to. *Whitaker* v. *McLean*, 73 App. D.C. 259, 118 F.2d 596 (1941); *Moskun* v. *United States*, 143 F.2d 129 (6th Cir. 1944); *Knapp* v. *Kinsey*, 232 F.2d 458, 465-467 (6th Cir. 1956), certiorari denied, 352 U.S. 892; *Crowe* v. *Di Manno*, 225 F.2d 652 (1st Cir. 1955). Perhaps the statutory affidavit may be more of a requisite when the bias alleged rests on matters outside the record, but here the grounds arise out of comments made by the judge on the record in these very proceedings. As the Court of Appeals for the District of Columbia Circuit stated in *Whitaker* v. *McLean*, *supra*:

> "Few, if any judges would make the reported remarks in the course of a trial, unless they had developed a definite and positive hostility to plaintiff and his case . . . . [A] right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial."

The principles thus expressed so clearly in a civil case apply with even greater force to criminal cases.

Second, and what it claimed to be "more important", the Government's opposition filed in the Court of Appeals relied upon what it stated to be "the fact that Thompkins was indeed terrorized by petitioner" (R. 38). For this asserted fact the Government's opposition sought support in statements made by the Court of Appeals in its opinion on petitioner's successful appeal from the first conviction. 106 App. D.C. 275, 276, 279, 272 F.2d 504, 505, 508. But it is

entirely clear that on the first appeal the Court of Appeals was not making any determination whatsoever as to whether petitioner in fact had or had not terrorized Thompkins; the Court of Appeals held that petitioner's right to a fair trial had been prejudiced by lurid newspaper accounts of an episode which easily might have led the jury to draw such a conclusion (see page 6, *supra*). No testimony was ever taken either from petitioner or from Thompkins bearing on whether any such terrorization had actually occurred. Whatever impression or belief Judge Holtzoff may have had, or whatever Judge Holtzoff may have surmised, concerning whether any such terrorization had occurred, was based either on his own erroneous recollection or on what persons other than petitioner and Thompkins had asserted. Moreover, in Thompkins' letter (see page 8, *supra*), written after the supposed "terrorization" and prior to sentencing of petitioner at the first trial, Thompkins had expressly written to Judge Holtzoff that (R. 48):

> "On December 10—58 I was brought into Your Honor's court to testify falsely, which I refused to do so, and was found guilty of criminal contempts of court. It was told to Your Honor, by attorney Letterman and Mr. Flannery that I was in fear of one of the defendant in the case, which is not true at all."

Essentially the Government opposition's position in the Court of Appeals appeared to be that there is no unfairness in compelling that a defendant be tried before a manifestly hostile or prejudiced judge, provided the hostility or the prejudice has some factual foundation. Such cannot be the law in the federal courts generally, and certainly should not be allowed to become the law in the District of Columbia, where the availability of a substantial number of trial judges makes the problem of recusation less difficult than it might be in a district having customarily

only a single federal judge. But in any event, no actual court inquiry or determination ever was made by Judge Holtzoff or anyone else which would establish that petitioner had actually terrorized Thompkins. Hence it could not be said that the hostility manifested by Judge Holtzoff was sufficiently founded on fact to warrant overlooking its disruptive influence on the fair and proper administration of justice.

In the federal courts no defendant should be compelled to go to trial before a judge who, before the trial has begun, has manifested "a definite and positive hostility" to the defendant and his case. *Whitaker v. McLean, supra.* Having displayed such a firm degree of feeling against petitioner and against evidence which the defense might seek to adduce at the trial, Judge Holtzoff should not have proceeded to preside at this trial.

In any particular case it may be somewhat difficult to identify with certainty what are the exact respects in which the existence of hostility from the outset on the part of the judge has actually affected the conduct of the trial and its outcome. In many ways, both obvious and subtle, it may work to the severe prejudice of a defendant, no matter how conscientiously the judge may strive to avert this. It is likely to be especially important in areas where the trial judge's actions rest within the realm of judicial discretion—such as certain types of rulings on evidence, or the judge's comment or refusal to comment to the jury on the testimony, or the sentence imposed. Moreover, a defendant may well be more reluctant to take the stand to testify if there has been a clear manifestation before the trial begins that the judge is hostile to the defendant or to the defendant's case.

In any event, these are intangibles which a fair administration of the criminal law should make it wholly

unnecessary to explore. The appellate court should not be put in the position of having to make an almost impossible effort, after the trial, to weigh exactly how much the defendant has actually suffered from a judge's predisposition of hostility. As this Court said in *Berger* v. *United States*, 255 U.S. 22, 36:

> "The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

Rather, the remedy is to transfer the case to another judge for trial and thus to prevent the question from arising at all. Here this could very easily have been achieved if Judge Holtzoff had recused himself and requested that another judge be assigned to the trial.

The degree of hostility manifested before the trial plainly surpassed acceptable bounds. It would have been most appropriate if Judge Holtzoff himself had recognized this and had on his own initiative transferred the case to another judge. Failing this, he should have done so in response to defense counsel's two oral motions.

Our legal system not only must do justice; it also must "satisfy the appearance of justice". *Offutt* v. *United States*, 348 U.S. 11, 14; *Levine* v. *United States*, 362 U.S. 610, 616; *In Re Murchison*, 349 U.S. 133, 136. The present trial has failed in both respects, and on these grounds the conviction should be reversed.

## IV.

**Serious Prejudicial Errors Were Committed by Judge Holtzoff in Connection With the Prosecution's Being Allowed to Use Extensive Testimony Given at the First Trial by the Co-defendant Artis, Who Was Unavailable as a Witness at This Second Trial.**

As has been shown (pages 14-19, *supra*), a number of important issues requiring appellate determination arose out of the prosecution's use here of Artis' first-trial testimony.

A. *Judge Holtzoff's erroneous exclusion of Artis' subsequent recantation, as well as of Artis' other contradictory admissions.*

The reasons given by Judge Holtzoff for totally excluding Artis' recantation statement (page 16, *supra*) have no sound foundation in the law. The fact that the recantation was not notarized certainly is irrelevant to its admissibility, though conceivably it might be one of many circumstances to be taken into account by a jury in considering the weight to be attached to it. As to the genuineness of the Artis signature which twice appeared on the recantation statement, petitioner's trial counsel pointed out that there were already in evidence in the case one or two money orders bearing Artis' signature which provided a basis of comparison, and in addition petitioner's trial counsel immediately accepted Judge Holtzoff's initial suggestion that the recantation statement be turned over to the FBI for a handwriting comparison (R. 92). The fact that the body of the statement, other than Artis' two signatures, was in a handwriting which Judge Holtzoff thought he recognized as being "the handwriting of some gentleman who is an inmate of the penitentiary" was likewise totally

irrelevant to the admissibility of the recantation statement. From the standpoint of the admissibility of this important evidence which would have gravely impeached the Artis testimony, no explanation was suggested why it is any the more questionable for an indigent inmate to employ a fellow inmate as an amanuensis (which is often a practical necessity), than it would be for him to use a typewriter.[12] Judge Holtzoff's reasons for depriving the jury of all knowledge of this recantation statement are totally unsupportable.

As for Judge Holtzoff's further observation that admission of Artis' recantation would be "in violation of the rules of evidence" (page 16, *supra*), only recently this Court said: "It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness." *Grunewald* v. *United States*, 353 U.S. 391, 418. No different rule can properly be applied in criminal cases where, as here, a prosecution witness who at the first trial has implicated the defendant makes statements thereafter not merely impeaching but entirely retracting his testimony, and the witness then dies or becomes otherwise unavailable before the second trial. Indeed, if the rule were otherwise, a defendant might be convicted at a first tral on the basis of testimony which the witness himself later repudiated as wholly perjurious; because of the accident that the witness had died or become otherwise legally unavailable between the time of the repudiation and the time of the second trial, the prosecution could nevertheless use such first-trial testimony without the jury ever finding out that the testimony had been repudiated. By reason of the witness' intervening death or other unavailability, the testimony of liars and perjurors would be forever immunized against impeach-

[12] Actually, the statement is written out in a kind of hand printing, which is a reasonably clear indication that the amanuensis was used as a substitute for a typewriter.

ment; it could be used, and used one-sidedly, at a second trial no matter how total the recantation or the refutation might be.

No system of justice could risk sending innocent men to prison on so flimsy a foundation. Such unconscionable results would not be consistent with the Due Process Clause nor with the principles of fundamental fairness and of sound policy required in the administration of criminal justice in the federal courts.

To the extent that the closely-divided decision in *Mattox* v. *United States*, 156 U.S. 237, 244-250, may appear to be to the contrary—although *Mattox* did not involve a subsequent written recantation signed by the witness himself—it should be noted that the principles expressed in *Mattox* were soon limited by this Court in *Carver* v. *United States*, 164 U.S. 694, 698, and the problem does not appear to have come back to this Court for further consideration in more than sixty years. In any event, it is clear that *Mattox* cannot be reconciled with later developments in the criminal law. *People* v. *Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *Harschbert* v. *State*, 117 Tex.Cr. 504, 506-508, 35 S.W.2d 430, 431 (1930); compare *Grunewald* v. *United States*, *supra*; 3 Wigmore, Evidence §1032. In the *Collup* case, for example, the Supreme Court of California, overruling several of its earlier decisions, adopted the views of the dissenting opinion in *Mattox*, from which it quoted the following passage with approval (from 156 U.S. at 257-258):

> "Undoubtedly, the credit of witnesses testifying under oath should not be assailed by evidence of their statements made elsewhere, without affording them, if practicable, in justice to them and to the party calling them, with an opportunity to deny, explain, or admit; but it must not be overlooked that the primary object

> of the trial is not to vindicate the truth or consistency of witnesses, but to determine the guilt or innocence of the accused. If the evidence tending to show that the testimony of an essential witness cannot be relied on, because he has made contradictory statements elsewhere and at other times, is valid and admissible, as the authorities all concede, why should the right to put in such evidence be destroyed by the incidental fact that the witness, by reason of death, cannot be produced to deny or to admit that he made such statements? Does not the necessity call for a relaxation of the rule in such a case?"

*Mattox* is out of harmony with "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 26, Federal Rules of Criminal Procedure. *Mattox* should not be revived and, if this be deemed necessary to establish its total inapplicability to a case such as the present one, then it should be expressly overruled.

From the foregoing it appears that Judge Holtzoff improperly excluded important probative evidence, showing subsequent admission by Artis that his first-trial testimony implicating petitioner was false and incorrect. And on somewhat comparable grounds Judge Holtzoff was equally in error in refusing to allow the witness Bush to give testimony, not available at the first trial, concerning prior admissions Artis had made which were in contradiction of Artis' first-trial testimony (pages 16-17, *supra*).

If Artis' first-trial testimony was to be available at all for use by the prosecution at the second trial—and under the unusual circumstances of this case it should not have been (pages 57-59, *infra*)—then the most elementary considerations of fairness and justice required that the defense

be allowed to adduce evidence of Artis' repudiations and contradictions of such testimony. This was vital impeaching evidence which petitioner was entitled to have put before the jury.

B. *Judge Holtzoff's prejudicial error in failing and refusing to inform the jury of the deficiencies and weaknesses he himself had noted in Artis' testimony at the first trial.*

At the first trial Judge Holtzoff had made it clear that he regarded Artis as a highly unsatisfactory witness (pages 17-18, *supra*). When Artis was absent at the second trial, rendering it impossible for the jury to gain any impression of the witness based on demeanor, it became even more important to communicate to the jury what Judge Holtzoff knew about the deficiencies and weaknesses of Artis' testimony. This, however, Judge Holtzoff refused to do, although requested to by defense counsel (page 18, *supra*), and although his instructions to the jury contained many other comments on the evidence (R. 172-179).

In the federal courts the proper extent of a trial judge's comments to the jury on the testimony rests largely within his discretion, but the discretion can sometimes be abused. *Quercia* v. *United States*, 289 U.S. 466. Judge Holtzoff abused it here by failing to meet the minimum responsibility imposed on him by the exceptional circumstances of this case. The effect of allowing Artis' first-trial testimony to be read to the jury without any comparable admonition whatsoever was to work serious prejudice against petitioner. Moreover, the prejudice was further magnified by Judge Holtzoff's instruction telling the jury they might convict petitioner solely on the basis of Artis' testimony uncorroborated (page 23, *supra*), even though at the first trial he had said "I would not send anybody to the peniten-

tiary on the testimony of Artis" (page 17, *supra*). If this same testimony of the absent Artis was to be used at all at the second trial, then it was grossly unfair for the Government to be allowed to use it without the jury being informed of the important limitations which Artis' actual appearance as a witness at the first trial had so plainly developed.

C. *Judge Holtzoff's error in failing to require the prosecution to produce the original of the Artis statement of December 2, 1958.*

Judge Holtzoff's refusal to honor defense counsel's demand for the original of this statement (page 18, *supra*) cannot be justified. Since the original was admittedly in the Government's possession, the Jencks Act (18 U.S.C. §3500) required it to be produced as a statement of the witness Artis, and also (having been written out by FBI agent Darragh) as a report of the witness Darragh. *Clancy* v. *United States*, 365 U.S. 312; *Campbell* v. *United States*, 365 U.S. 85. The Government's failure to produce this original, and Judge Holtzoff's condonation of this failure, manifests a serious disregard of the duties which the Jencks Act imposes on both prosecutors and trial judges. Particularly in a trial where the Artis matter occupied such prominence and was a source of such controversy, where questions even were raised as to Artis' handwriting, and where defense counsel made it clear that one reason for demanding the original was to use it as a basis of further cross-examination of Darragh (pages 14-19, *supra*), the right of the defense to inspect the original of this statement should have been scrupulously safeguarded by the court. The statute is "designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian." *Campbell* v. *United States*, *supra*, 365 U.S. at 92.

D. *Judge Holtzoff's error in admitting damaging hearsay on the Artis matter.*

As has been shown (page 19, *supra*), a severe prejudice resulted from FBI agent Darragh's hearsay testimony on redirect, received over defense objection, to the effect that Artis immediately after arrest had implicated petitioner as the person to whom Artis gave money received from cashing one of the money orders. This error, moreover, has cumulative consequences when assessed not in isolation but together with other errors committed in connection with the Artis matter.

E. *Judge Holtzoff's error in refusing to exclude entirely the Artis first-trial testimony under the unusual circumstances of this case.*

When the Artis matter is looked at as a whole, it becomes clear that Judge Holtzoff should have sustained defense objections (page 14, *supra*) to the entire Artis first-trial testimony.

The right of confrontation in criminal cases is guaranteed by the Sixth Amendment, and the courts have been "zealous to protect these rights from erosion." *Greene* v. *McElroy*, 360 U.S. 474, 497. In exceptional cases, such as where a witness has died or become legally unavailable, the testimony given by the witness at a prior trial may be introduced in evidence at a subsequent trial, but this is subject to careful safeguards. *Meyers* v. *United States*, 84 App. D.C. 101, 171 F.2d 800 (1948); *Tatum* v. *United States*, 101 App. D.C. 373, 376, 249 F.2d 129, 131 (1957); *Christoffel* v. *United States*, 200 F.2d 734, 741-743, 91 App. D.C. 241, 248-250 (1952), vacated for resentencing, 345 U.S. 947.

In the present case a combination of highly unusual circumstances required that, in the interests of justice, Artis'

first-trial testimony should be entirely excluded. At the first trial Artis had been such an unsatisfactory witness as to lead to highly adverse comments on his testimony from Judge Holtzoff at that time (pages 17-18, *supra*). Subsequent to the first trial Artis apparently had recanted and totally repudiated his testimony implicating petitioner (pages 15-16, *supra*). Artis' unavailability at the second trial was the result of severe illness, both physical ("chronic lymphatic leukemia") and mental ("chronic brain syndrome, paranoid, schizophrenia with mental deterioration") (R. 20), and there was no way of telling how early the mental condition had started or whether it might have been responsible for some of Artis' first-trial testimony implicating petitioner. Under all the circumstances, the interests of fairness and justice required that the defense objections be sustained and that the Artis first-trial testimony should not be used at all.[13] Instead of instructing the jury that

[13] Conceivably the Government may argue (though it has not yet done so) that Artis' testimony went directly to the first two money orders involved in counts 3 through 7, but not to the third money order involved in counts 8, 9 and 10 (see pages 14-15, *supra*, and Appendix B to this brief); and that since petitioner received concurrent sentences on each count (page 24, *supra*), the whole Artis matter can be disregarded on appeal if petitioner's conviction on count 8, 9 or 10 could be otherwise sustained. Compare *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339, 359. Among the answers to such an argument would be the following: (A) The Artis matter occupied such great prominence in this trial that if errors occurred on the Artis matter, then a fair assessment of the record as a whole shows that petitioner was so greatly prejudiced in the eyes of the jury that a new trial is required in the interests of justice. Compare *Milanovich* v. *United States*, 365 U.S. 551, 555-556; *Whittaker* v. *United States*, 281 F.2d 631, 632 (D.C. Cir. 1960). (B) All three of the money orders involved in the trial came from a common source (Tr. 43-46, 53), and proof that petitioner was implicated in the cashing of any one of them would tend to lead the jury to believe petitioner was implicated in all three of them, compare *United States* v. *Sahadi*, 292 F.2d 565, 566-567 (2d Cir. 1961); accordingly, errors with respect to the Artis matter clearly

they might convict petitioner on the uncorroborated testimony of Artis alone (page 23, *supra*), Judge Holtzoff should have kept the Artis testimony from ever being placed before them.

---

worked to petitioner's prejudice also with respect to the third money order involved in counts 8, 9 and 10, even though Artis was not directly testifying about that particular money order. (C) The principal testimony implicating petitioner in the offenses covered by counts 8, 9 and 10 was the testimony of Quincy McCall (Tr. 102-106, 110-112), which was in conflict with the testimony given concerning this money order by the defense witness Alexander (Tr. 397-398); Alexander also gave testimony (Tr. 375-379) for the defense on the money order involved in counts 5, 6 and 7, in conflict with the Artis testimony offered by the prosecution; and if the jury accepted Artis' testimony in preference to Alexander's, as evidently it did, then the effect of erroneously admitting the Artis testimony was to prejudicially discredit in the jury's eyes all testimony of the defense witness Alexander, including his testimony on counts 8, 9 and 10. (D) Where concurrent indeterminate sentences are imposed under the District of Columbia indeterminate sentence law (D.C. Code, §24-203)—here, 20 months to 5 years on each count, to run concurrently—it is highly probable that the number of offenses on which the defendant stands convicted will have significant and material effects on the length of sentence he will actually serve; hence an appellate adjudication on the remaining counts is of practical importance even though conviction on one count were to be sustained. (E) In any event, future penalties imposed on a defendant, as well as his possibilities for early parole, may well be materially affected by the number of offenses on which he stands convicted; sustaining one count accordingly does not justify refusal to give appellate review on other counts; the doctrine that other counts need not be considered on appeal was developed prior to and independently of cases such as *United States* v. *Morgan*, 346 U.S. 502; *Fiswick* v. *United States*, 329 U.S. 211, 220-223; and *Pollard* v. *United States*, 352 U.S. 354, 358, and should be re-examined and not followed in cases where the considerations found persuasive in the latter group of decisions apply.

## V.

**The Prosecutor in His Summation, by Inexcusably Vouching for the Veracity of Government Witnesses, Deprived Petitioner of a Fair Trial.**

The prosecutor's vouching for Government witnesses (pages 19-22, *supra*) was in this case without justification. It was highly prejudicial, especially in a case which turned on the jury's assessment of the credibility of conflicting witnesses. *Berger* v. *United States*, 295 U.S. 78, 88; *Viereck* v. *United States*, 318 U.S. 236, 248.

The standards applicable in the federal courts to prosecutors' summations have been considered recently in *Greenberg* v. *United States*, 280 F.2d 472 (1960). There the Court of Appeals for the First Circuit held that a conviction was invalidated because the prosecutor had opened his summation by stating that he is a "sort of thirteenth juror" who uses his training to evaluate evidence, and then had closed his summation by stating his opinion that the defendant was guilty. The opinion, by Judge Aldrich, includes the following (280 F.2d at 474-475):

> "Rule 15 of the Canons of Professional Ethics of the American Bar Association reads,
>
> > 'It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.'
>
> Government counsel stated in oral argument before us that this was 'inapposite' because he is an 'advocate.' We are not clear whether he disapproves of the principle, or whether he considers himself outside of it. In either event we disagree. To permit counsel to express his personal belief in the testimony (even if not

phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure §293 (2d ed. 1913); 6 Wigmore, Evidence §1806 (3d ed. 1940).

"It is true that special circumstances, such as a personal attack upon counsel, may occasionally justify a reply. See, e.g., United States v. Socony-Vacuum Oil Co., Inc., 1940, 310 U.S. 150, 240-242, 60 S.Ct. 811, 84 L. Ed. 1129; Gridley v. United States, 6 Cir., 1930, 44 F.2d 716, 739; United States v. Battiato, 7 Cir., 1953, 204 F.2d 717, 719. Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions. To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice * * * .' State v. Gunderson, 1913, 26 N.D. 294, 297, 144 N.W. 659, 660."

In the light of the foregoing criteria, the prosecutor's summation in the present case exceeded permissible bounds and caused serious unfair prejudice to the defendant. No justification for such conduct by the prosecutor can be

drawn from *Lawn* v. *United States*, 355 U.S. 339, 359-360, note 15. Here, unlike *Lawn*, the prosecutor's comments were not provoked by anything defense counsel had said and, moreover, here the prosecutor did clearly insinuate that the prosecutor's statements were based on personal knowledge or on something else beyond the testimony given by the witnesses before the jury. The cumulative effect was to produce serious unfairness of the type proscribed by the *Greenberg* decision.

While no objection to the prosecutor's remarks was made at the time, the error is of a sufficiently fundamental nature when considered alone—and even more especially when considered together with other prejudicial features of the trial—to bring into operation the principle that "plain error" shall be noticed on appeal. Rule 52(b), Federal Rules of Criminal Procedure; compare *Surratt* v. *United States*, 106 App. D.C. 49, 50, 269 F.2d 240, 241 (1959). The unfairness, having a most flagrant and prejudicial character, originated with the prosecution. It occurred at the end of the trial, when all the evidence had been taken and the case was being put before the jury largely on the basis of which witnesses should be believed. And in any event, once the damage had been done, it is hardly possible that effective corrective action could have been taken by the trial judge.

Authority to notice plain errors and defects affecting substantial rights of a defendant "transforms the right of appeal in criminal cases into one of substance, and furnishes an additional affirmative guarantee that conviction and imprisonment can come only after the defendant has been accorded a fair and impartial trial". *Getchell* v. *United States*, 282 F.2d 681, 691 (5th Cir. 1960). Moreover, an indigent appellant is certainly entitled to the same opportunity which would be accorded to a non-indigent

appellant to obtain an appellate determination on the merits as to whether the doctrine of plain error applies in a particular case.

## VI.

### Corroboration Should Be Required to Support a Conviction Based on the Testimony of an Accomplice.

As already noted (page 23, *supra*) Judge Holtzoff's instructions to the jury left it open to them to convict petitioner solely on the basis of the uncorroborated testimony of the co-defendant Artis.

It is true that such a charge is in accord with several prior decisions of the District of Columbia Court of Appeals—namely, *Egan* v. *United States*, 52 App. D.C. 384, 287 Fed. 958 (1923); *McQuaid* v. *United States*, 91 App. D.C. 229, 198 F.2d 987 (1952); *Bishop* v. *United States*, 100 App. D.C. 88, 243 F.2d 32 (1957)—as well as decisions in the various other circuits.[14] However, the decisions referred to are deserving of the most careful reconsiderations, particularly in the light of recent developments in the law.

The question whether testimony of an accomplice must be supported by some corroboration connecting the defendant with the offense has had a long and complex history in common law jurisdictions. Over a period of several

---

[14] *Benedicto Lebron* v. *United States*, 241 F.2d 885, 887 (1st Cir. 1957); *United States* v. *Stromberg*, 268 F.2d 256, 272 (2d Cir. 1959); *United States* v. *Migliorino*, 238 F.2d 7, 10 (3rd Cir. 1956); *Gormley* v. *United States*, 167 F.2d 454, 457-458 (4th Cir. 1948); *Lyles* v. *United States*, 249 F.2d 744 (5th Cir. 1957); *Poliafico* v. *United States*, 237 F.2d 97, 115 (6th Cir. 1956); *United States* v. *Carengella*, 198 F.2d 3, 7 (7th Cir. 1952); *Esters* v. *United States*, 260 F.2d 393, 394 (8th Cir. 1958); *Marcella* v. *United States*, 285 F.2d 322 (9th Cir. 1960); *Johns* v. *United States*, 227 F.2d 374 (10th Cir. 1955).

hundred years the law's development on this subject has been generally in the direction of more rigorous standards; and nearly half the States of the Union have statutes which affirmatively prevent the trial judge from sending a criminal case to the jury on the basis of an accomplice's testimony unless some corroborative evidence connecting the defendant with the crime has been adduced. 7 Wigmore, Evidence §2056; see, e.g., *People* v. *Wallin*, 32 Cal. 2d 803, 808-809; 197 P.2d 734, 737 (1948); *State* v. *McLaughlin*, 250 Minn. 309, 84 N.W.2d 664 (1957); *State* v. *Grig*, 105 N.W.2d 892, 896 (Minn., 1960); *People* v. *Malizia*, 4 N.Y.2d 22, 148 N.E.2d 897 (1958); *Goodwin* v. *State*, 165 Tex.Cr. 375, 307 S.W.2d 264 (1957); *Medley* v. *State*, 338 S.W.2d 474 (Tex.Cr. App. 1960); *Ing* v. *United States*, 278 F.2d 362 (9th Cir. 1960) (for Alaska). The same rule prevails in some other states—including the neighboring State of Maryland—without the aid of statutory command. *Watson* v. *State*, 208 Md. 210, 217, 117 A.2d 549, 552 (1955); *Wright* v. *State*, 219 Md. 643, 650, 150 A.2d 733, 737 (1959); *Forrester* v. *State*, 224 Md. 337, 345, 167 A.2d 878, 882-883 (1961); *Witham* v. *State*, 191 Tenn. 115, 122, 232 S.W.2d 3, 6 (1950). The policy reflected in those jurisdictions where corroboration is required, whether by statute or decision or both, is based on extensive experience as to possible dangers and unreliability of accomplice testimony, and on the need to insist, in the interests of fairness, upon the safeguard of some corroboration connecting the defendant with the offense.

The prior District of Columbia decisions referred to, like a number of decisions in other circuits, have held that in criminal trials in the federal courts corroboration is not required for the testimony of an accomplice. But all such decisions constitute somewhat attenuated extrapolations from two opinions of this Court, *Holmgren* v. *United*

*States*, 217 U.S. 509, 523-524, and *Caminetti* v. *United States*, 242 U.S. 470, 495. In *Holmgren* the ground of decision was that a requested charge was incorrect because it improperly assumed the witness to be clearly an accomplice; this Court went on to say: "It is undoubtedly the better practice for the courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". In *Caminetti*, this Court repeated what was said in *Holmgren* and then added: "While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop, Crim. Proc. 2d ed. §1081, and cases cited in the note." It should be noted, moreover, that in *Caminetti* the conviction at least was supported by the testimony of two accomplices, rather than of one alone, so that each accomplice's testimony might have been deemed to have provided some corroboration for the other's.

It is fitting that the law on this subject should now be reexamined from the standpoint of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience". Rule 26, Federal Rules of Criminal Procedure; *Hawkins* v. *United States*, 358 U.S. 74. The problem is an important and recurring one in the trial of criminal cases throughout the federal courts, including the District of Columbia. The prior decisions of the District of Columbia Court of Appeals—which it is urged should now be qualified or overruled or rejected—have carried the non-corroboration doctrine to extreme lengths, and without even the safeguards which must have been contemplated by *Holmgren* and *Caminetti*. Some of those safeguards were preserved in *Freed* v. *United States*, 49 App. D.C. 392, 266 Fed. 1012 (1920), but have been lost sight of in subsequent decisions.

*Holmgren* and *Caminetti* establish that during the past fifty years this Court's doctrine has been that it is "the better practice" to instruct the jury to require corroboration before the testimony of an accomplice can justify conviction. It is difficult to understand why the District of Columbia Court of Appeals and the courts in other circuits have felt so free to depart from and to ignore such "better practice". Two generations of failure on the part of the lower federal courts to follow what this Court has described as the "better practice" must surely be enough. Nor is it apparent why "better practice" should not equally require an acquittal if the accomplice's testimony is supported by no corroboration whatsoever connecting the defendant with the offense. A reexamination of the matter is called for, and is certainly appropriate under the evolutionary principles embodied in Rule 26 of the Federal Rules of Criminal Procedure.

A number of additional reasons make such reconsideration most suitable. The problem as to accomplice testimony frequently arises in conspiracy cases; and the great expansion in the federal law of conspiracy—"that elastic, sprawling and pervasive offense" (concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, 445)—necessitates a thoughtful reassessment of the safeguards which in the light of modern conditions are necessary and desirable to forestall serious miscarriages of justice. Moreover, apart from the special problems arising in conspiracy cases, in recent years this Court has given renewed and enlarged recognition to a requirement of corroboration in various situations, *Weiler* v. *United States*, 323 U.S. 606 (perjury prosecutions); *Opper* v. *United States*, 348 U.S. 84 (extrajudicial admissions of a defendant); *Smith* v. *United States*, 348 U.S. 147, 151-159 (admissions of elements of offense which involves no tangible *corpus delicti*), where the danger of injustice appears

to be no greater, and perhaps is less, than in situations where conviction might otherwise rest solely on the testimony of one accomplice. The District of Columbia Court of Appeals likewise has recently enlarged the scope of the corroboration requirement in situations where required in the interests of justice. *Kelly* v. *United States*, 90 App. D.C. 125, 194 F.2d 150 (1952); *Wilson* v. *United States*, 106 App. D.C. 226, 271 F.2d 492 (1959). Perhaps the present case is a somewhat extreme one, but in view of the nature and deficiencies of the Artis testimony (pages 14-18, *supra*), it is a shocking departure from the standards of fair play and of justice for the jury here to have been instructed that they might convict petitioner on the basis of Artis' testimony alone and uncorroborated. Certainly in this type of case there is strong need for the jury to be instructed that the testimony of an accomplice will not suffice for conviction unless they are satisfied that there is corroboration connecting the defendant with the offense.

It is true that no specific objection was made to the accomplice charge as given by Judge Holtzoff. However, in view of Judge Holtzoff's other rulings and in view of the prior decisions of the District of Columbia Court of Appeals, any such objection would have been totally unavailing and would not have resulted in the slightest modification of the charge. Thus, absence of objection could in no way have lulled the trial judge into allowing error to go uncorrected. It is not to the District Court but to the appellate courts that one must look for appropriate reconsideration of the doctrine at issue. Under the circumstances, and in view of the large public importance of this question, it is singularly fitting that the doctrine be reconsidered on appellate review of this case. And certainly an indigent appellant is entitled to the same opportunity which would be accorded to a non-indigent appellant to

obtain a determination whether prior decisions should be modified or overruled or rejected.

## VII.

**Judge Holtzoff's Charge Was Totally Defective in Omitting to Define an Essential Element of the Offenses.**

As noted, in dealing with counts 7 and 10—the alleged offenses under 18 U.S.C. §2314, involving interstate transportation of a forged security—the charge clearly fails and omits to instruct the jury that, as an essential element of the offense, the Government must also establish knowledge on the defendant's part that the security was falsely made and forged (pages 23-24, *supra*). The subsequent decision of the District of Columbia Court of Appeals in *Barry* v. *United States*, 109 App. D.C. 301, 287 F.2d 340, was surely correct in holding this to be a fatal defect in a charge given under this statute. And the *Barry* holding that the defect is plain error, requiring reversal even though no objection was made at the trial, is equally applicable to petitioner's case. It is a "fundamental right" of a defendant "that he be convicted of crime only on proof of all the elements of the crime charged against him". *Christoffel* v. *United States*, 338 U.S. 84, 90.

Examination of the portions of Judge Holtzoff's charge dealing with the elements of the offenses of forgery, attempting to utter and uttering (D.C. Code, §22-1401), disclose comparable inadequacies and lack of clarity (R. 175-177, 178-179). Judge Holtzoff left it especially unclear whether the "intent to defraud" must be the intention of the defendant, or merely the intention of the various co-defendants; and he concluded this point by charging (R. 179):

> "the fact, if it be the fact, that he [petitioner] was driving the car with the intention of, if it was the

intention of, bringing the party to a store to which the check was to be presented for cashing, if he knew that was the purpose of the trip, he can be said to be an aider and abettor and a participant in the offense, if you find that to be the fact."

Thus Judge Holtzoff's last word to the jury left it to them to convict petitioner as a participant if he drove the car knowing the co-defendants intended to cash the money order, but totally without regard to whether petitioner himself knew that the money order was forged. On grounds comparable to *Barry*, a charge so inadequate is plain error requiring reversal.

## VIII.

**Strong Considerations Favor This Court's Deciding the Merits of Petitioner's Appeal Now, Instead of Remanding for an Initial Determination by the Court of Appeals.**

As already indicated (page 36, *supra*), precedents can be found in this Court for either method of disposition; accordingly, the issue is what appears to be "just under the circumstances". 28 U.S.C. §2106.

One pertinent circumstance is that petitioner's conviction at this second trial occurred in March, 1960; at the time of filing this brief it is nineteen months later, and petitioner has not yet had the appellate review on the merits to which he clearly was entitled. When convicted, he was already serving a sentence on a prior conviction, and the sentence in the present case was to begin only at the expiration of the prior sentence (R. 183). It is understood that on or about November 2, 1961, his service of the prior sentence will be completed, and thereupon his service of the present sentence will begin. This case now is expected to be argued in this Court at the earliest in

December 1961, by which time petitioner will be serving the present sentence; and being indigent, petitioner will not have available the means of obtaining release on bail pending final adjudication. Particularly in view of the long delay which already has occurred in obtaining appellate review on the merits—a delay which certainly cannot be attributed to petitioner—there is little to commend a course which would involve still further delay in reaching the merits.

Moreover, the nature of the issues strongly suggests the need for a prompt determination on the merits by this Court. The questions arising in connection with the challenge to the indictment turn directly on the scope of this Court's decisions, particularly in *Costello, Lawn* and *Napue* (pages 37-46, *supra*). The issues arising in connection with the Artis testimony revolve, at least in part, around the residual reverberations of this Court's nearly-forgotten decision in *Mattox* (pages 53-55, *supra*). The issue as to whether corroboration should be required for accomplice testimony grows directly out of this Court's decisions in *Holmgren* and *Caminetti* (pages 64-67, *supra*). Accordingly, it seems especially fitting for this Court to resolve these matters by reaching the merits now.

## Conclusion

Petitioner has been improperly and unlawfully deprived of the appellate determination he is entitled to obtain on the merits of his appeal. On balance, the pertinent considerations strongly favor this Court's deciding the merits of petitioner's appeal at this time, instead of remanding for an initial determination by the Court of Appeals.

For many reasons which have been set forth—separately and even more decisively in their aggregate impact—petitioner's conviction should be reversed.

In addition, the case should be remanded to the District Court with instructions that the indictment against petitioner shall be dismissed unless the Government shall promptly inform the District Court that the Government has grounds for controverting the allegations contained in the motion to dismiss (and supporting documents) and that the Government wishes to have a hearing thereon, in which event the hearing shall be promptly held and the matter promptly determined. The District Court should be further instructed that if, at any such hearing, it appears that petitioner has been put to a significant disadvantage by virtue of the passage of time or change of circumstances since the District Court's erroneous ruling on petitioner's motion to dismiss the indictment,[15] then the indictment shall be dismissed.

Respectfully submitted,

BENNETT BOSKEY
*1701 K Street, N. W.*
*Washington 6, D. C.*
*Attorney for Petitioner*
*(by appointment of the Court of Appeals)*

October, 1961

---

[15] At the oral argument on this motion, petitioner's counsel had Thompkins available to testify if the court wished to call Thompkins as a witness (page 9, *supra*). Subsequently, at this second trial, after Thompkins had been advised by court-appointed counsel (Tr. 50-52), Thompkins refused to testify as a witness for either the Government or the defense and his claim of privilege was sustained (Tr. 77-82, 298-307). For that or some other reason, Thompkins might turn out to be now unavailable as a witness to testify in support of the motion, even though he had been fully available at the time the District Court took its erroneous action on the motion. In such eventuality, petitioner should not be further prejudiced because of the change of circumstances occurring after the District Court made its erroneous ruling.

## APPENDIX A

### Constitution, Statutory and Rules Provisions Involved

The Constitution, Preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Fifth Amendment, Due Process Clause:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

18 U.S.C. §2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507.

18 U.S.C. §3500. Demands for production of statements and reports of witnesses:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains

matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

28 U.S.C. §1915. Proceedings in forma pauperis:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States. As amended Oct. 31, 1951, c. 655, § 51(b, c), 65 Stat. 727; Sept. 21, 1959, Pub. L. 86-320, 73 Stat. 590.

28 U.S.C. §2106. Determination:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

District of Columbia Code, §22-1401. Forgery:

Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, § 843.)

Federal Rules of Criminal Procedure, Rule 52(b). Plain Error:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

# APPENDIX B

## Counts 3 Through 10 of the Indictment

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Impanelled May 1, 1958,

Sworn in on May 6, 1958

Criminal No.

Grand Jury Nos. 1625-57, 274-58, 1620-57, 397-58

Housebreaking and Larceny
Forgery and Uttering
(22 D.C.C. 1801, 2201, 2202, 1401)
Vio. 18 U.S.C. 2314

---

THE UNITED STATES OF AMERICA

v.

MARK COPPEDGE, JR.
ALLEN W. ALEXANDER
CLARENCE H. TYLER
CLARENCE THOMPKINS
ADAM H. ARTIS

---

The Grand Jury charges:

[Counts 1 and 2 omitted in printing]

THIRD COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, falsely made a Nation-Wide Money

Order by inserting the amount, date, the name James Stewart and the address 732 Apex Rd. Roanoke Va. on the face of the said Nation-Wide Money Order. Following is a photostatic copy of said falsely made Nation-Wide Money Order:

[Copy of D-006188 omitted in printing]

FOURTH COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, did attempt to pass and utter to Morris Gevinson, as true and genuine, a falsely made Nation-Wide Money Order, a copy of which is set forth in the third count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.

FIFTH COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, falsely made a Nation-Wide Money Order by inserting the amount, date, the names James Stewart and the address 732 Apex Rd. Roanoke Va. on the face of the said Nation-Wide Money Order. Following is a photostatic copy of said falsely made Nation-Wide Money Order:

[Copy of D-006162 omitted in printing]

SIXTH COUNT:

On or about December 2, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with intent to defraud, passed and uttered to Abraham Borak, as true and genuine, a falsely made Nation-Wide Money Order, a copy of which is set forth in the fifth count of this indictment and is incorporated herein by reference,

well knowing the aforesaid Nation-Wide Money Order was falsely made.

SEVENTH COUNT:

On or about December 6, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler, Clarence Thompkins and Adam H. Artis, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the District of Columbia to the State of Maryland, a certain falsely made security, that is, a Nation-Wide Money Order, a copy of which is set forth in the fifth count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.

EIGHTH COUNT:

On or about December 3, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler and Clarence Thompkins, with intent to defraud, falsely made a Nation-Wide Money Order by inserting the amount, date, the names George Thompkins and James Stewart and the address 732 Apex Rd. Roanoke Va. on the face of the said Nation-Wide Money Order. Following is a photostatic copy of said falsely made Nation-Wide Money Order:

[Copy of D-006160 omitted in printing]

NINTH COUNT:

On or about December 3, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler and Clarence Thompkins, with intent to defraud, passed and uttered to Augustus Jackson, as true and genuine, a falsely made Nation-Wide Money Order, a copy of which is set forth in the eighth count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.

TENTH COUNT:

On or about December 10, 1957, within the District of Columbia, Mark Coppedge, Jr., Allen W. Alexander, Clarence H. Tyler and Clarence Thompkins, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the District of Columbia to the State of Maryland, a certain falsely made security, that is, a Nation-Wide Money Order, a copy of which is set forth in the eighth count of this indictment and is incorporated herein by reference, well knowing the aforesaid Nation-Wide Money Order was falsely made.